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International Court of Justice

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Appendix I

Documents.

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DOCUMENTS

TO THE BRIAND-KELLOGG-PACT

(Pact of Paris).

The following documents or extracts from documents are taken from:

The Department of State:

Treaty of the Renunciation of War

Text of the Treaty, notes exchanged, instruments of ratification and of adherence and other papers.

United States Government Printing Office

Washington: 1933

Publication No. 468

(VIII and 315 Pages).

The French Ministry for Foreign Affairs published:

"General Pact for the renunciation of war as an instrument of national policy."

30 items

Paris 1928.

I.

The Secretary of State (Kellogg) to the

French Ambassador (Claudel)

Washington, February 27, 1928.

Excellency: Our recent discussions of the question whether the United States and France could join in suggesting to the other principal Powers of the world the conclusion of a treaty proscribing war as an instrument of national policy in their mutual relations have been brought by your note of January 21, 1928, to a point where it seems necessary, if success is to be achieved, to examine the problem from a practical point of view. (1)

.....

I trust, therefore, that neither France nor any other member of the League of Nations will finally decide that an unequivocal and unqualified renunciation of war as an instrument of national policy either violates the specific obligations imposed by the Covenant or conflicts with the fundamental idea and purpose of the League of Nations. On the contrary, is it not entirely reasonable to conclude that a formal engagement of this character entered into by all of the principal Powers, and ultimately, I trust, by the entire family of Nations, would be a most effective instrument for promoting the great ideal of peace which the League itself has so closely at heart. If, however, such a de- (2) (3) (4)

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claration were accompanied by definitions of the word "aggressor" and by exceptions and qualifications stipulating when nations would be justified in going to war, its effect would be very greatly weakened and its positive value as a guarantee of peace virtually destroyed. The ideal which inspires the effort so sincerely and so hopefully put forward by your Government and mine is arresting and appealing just because of its purity and simplicity; and I cannot avoid the feeling that if Governments should publicly acknowledge that they can only deal with this ideal in a technical spirit and must insist upon the adoption of reservations impairing, if not utterly destroying the true significance of their common endeavors, they would be in effect only recording their impotence, to the keen disappointment of mankind in general. (4) (5) (6)

.....

Accept (&c.)

Frank B. Kellogg.

Exh. No. 2

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II.

Note of the Government of the United States to the Governments of Great Britain, Germany, Italy, and Japan, Delivered at the Respective Foreign Offices April 13, 1928.

As Your Excellency is aware, there has recently been exchanged between the Governments of France and the United States a series of notes dealing with the question of a possible international renunciation of war. The views of the two Governments have been clearly set forth in the correspondence between them.

The Government of the United States, as stated in its note of February 27, 1928, desires to see the institution of war abolished and stands ready to conclude with the French, British, German, Italian and Japanese Governments a single multilateral treaty open to subsequent adherence by any and all other Governments binding the parties thereto not to resort to war with one another. (1)

The Government of the French Republic, while no less eager to promote the cause of world peace and to cooperate with other nations in any practical movement towards that end, has pointed out certain considerations which in its opinion must be borne in mind by those Powers which are members of the League of Nations, parties to the Treaties of Locarno, or parties to other treaties guaranteeing neutrality. My Government has not conceded that such conside- (2)

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rations necessitate any modification of its proposal for a multilateral treaty, and is of the opinion that every nation in the world can, with a proper regard for its own interests, as well as for the interests of the entire family of nations, join in such a treaty. It believes, moreover, that the execution by France, Great Britain, Germany, Italy, Japan and the United States of a treaty solemnly renouncing war in favor of the pacific settlement of international controversies would have tremendous moral effect and ultimately lead to the adherence of all the other governments of the world.

The discussions which have taken place between France and the United States have thus reached a point where it seems essential, if ultimate success is to be attained, that the British, German, Italian, and Japanese Governments should each have an opportunity formally to decide to what extent, if any, its existing commitments constitute a bar to its participation with the United States in an unqualified renunciation of war.

(3)

. . . . . .

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Exh. No. 3

III.

Draft of Proposed Treaty Submitted by the Government of France to the Governments of Great Britain, Germany, Italy, Japan, and the United States on April 20,1928

Here follows a copy of the original communication in French.

For the English translation, please see pp. 8 and 9.

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Draft of Treaty.

. . . . . .

Article 1

The high contracting parties without any intention to infringe upon the exercise of their rights of legitimate self-defense within the framework of existing treaties, particularly when the violation of certain of the provisions of such treaties constitutes a hostile act, solemnly declare that they condemn recourse to war and renounce it as an instrument of national policy; that is to say, as an instrument of individual, spontaneous and independent political action taken on their own initiative and not action in respect of which they might become involved through the obligation of a treaty such as the Covenant of the League of Nations or any other treaty registered with the League of

(1) (2) (3) (4)

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Nations. They undertake on these conditions not to attack or invade one another.

. . . . . .

Article 3

In case one of the high contracting parties should contravene this treaty, the other contracting powers would ipso facto be released with respect to that party from their obligations under this treaty. (5)

Article 4

The provisions of this treaty in no way affect the rights and obligations of the contracting parties resulting from prior international agreements to which they are parties. (6)

. . . . . .

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Exh. No. 4

IV.

The German Minister for Foreign Affairs (Stresemann) to the American Ambassador (Schurman)

V M 1990

Berlin, April 27, 1928.

. . . . . .

The German Government can accordingly declare that it is ready to conclude a pact in accordance with the proposal of the Government of the United

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States and to this end to enter into the necessary negotiations with the Governments concerned. To this declaration the German Government adds, moreover, its definite expectation that the realization of a pact of such importance will not fail to make its influence felt at once in connection with the shaping of international relations. Therefore, this new guarantee for the maintenance of peace must give a real impulse to the efforts for the carrying out of general disarmament. (1) And further still, the renunciation of war must as a necessary complement enlarge the possibilities of settling in a peaceful way the existing and potential conflicts of national interests. (2)

Accept (etc.) Stresemann

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Exh. No. 5

V.

The British Secretary of State for Foreign Affairs (Chamberlain) to the American Ambassador (Houghton)

(London,) May 19, 1928.

. . . . . .

The aim of the United States Government, as I understand it, is to embody in a treaty a broad statement of principle, to proclaim without restriction or qualification that war shall not be used as an instrument of policy. With this aim His Majesty's Government are wholly in accord. The French proposals, equally imbued with the same purpose, have merely added an indication of certain exceptional circumstances in which the violation of that principle by one party may oblige the others to take action seeming at first sight to be inconsistent with the terms of the proposed pact. His Majesty's Government appreciate the scruples which have prompted these suggestions by the French Government. The exact fulfilment of treaty engagements is a matter which affects the national honour; precision as to the scope of such engagements is, therefore, of importance. Each of the suggestions made by the French Government has been carefully considered from this point of view. (1) (2)

. . . . . .

The language of article 1, as to the renunciation of war as an instrument of national policy, renders it desirable that I should remind

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your Excellency that there are certain regions of the world the welfare and integrity of which constitute a special and vital interest for our peace and safety. His Majesty's Government have been at pains to make it clear in the past that interference with these regions cannot be suffered. Their protection against attack is to the British Empire a measure of self-defence. It must be clearly understood that His Majesty's Government in Great Britain accept the new treaty upon the distinct understanding that it does not prejudice their freedom of action in this respect. The Government of the United States have comparable interests any disregard of which by a foreign Power they have declared that they would regard as an unfriendly act. His Majesty's Government believe, therefore, that in defining their position they are expressing the intention and meaning of the United States Government. (3)

. . . . . .

I have (etc.) Austen Chamberlain

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Exh. No. 6

VI.

The Canadian Secretary of State for External Affairs (Mackenzie King) to the American Minister (Phillips)

Ottawa, 30 May, 1928

. . . . . .

The pre-eminent value of the League lies in its positive and preventive action. In bringing together periodically the representatives of fifty states, it builds up barriers against war by developing a spirit of conciliation, an acceptance of publicity in international affairs, a habit of co-operation in common ends, and a permanently available machinery for the adjustment of differences. It is true that the Covenant also contemplates the application of sanctions in the event of a member state going to war, if in so doing it has broken the pledges of the Covenant to seek a peaceful solution of disputes. Canada has always opposed any interpretation of the Covenant which would involve the application of these sanction automatically or by the decision of other states. It was on the initiative of Canada that the Fourth Assembly, with a single negative vote, accepted the interpretative resolution to which the Secretary of State of the United States recently referred, indicating that it is for the constitutional authorities of each state to determine in what degree it is bound to assure the execution of the obligations of this Article by employment of its military forces. The question of sanctions (1)

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has received further consideration by later Assemblies. It is plain that the full realization of the ideal of joint economic or military pressure upon an out-law power, upon which some of the founders of the League set great store, will require either an approach to the universality of the League contemplated when the Covenant was being drawn, or an adjustment of the old rules of neutrality to meet the new conditions of co-operative defence. (2) (3)

. . . . . .

(Accept (etc.)

W.L.Mackenzie King

Secretary of State for External Affairs

VII.

Note of the Government of the United States to the Governments of Belgium, Czechoslovakia, France, Germany, Great Britain, Irish Free State, Italy, Japan, and Poland, Delivered at the Respective Foreign Offices, June 23, 1928

. . . . . .

It will likewise be recalled that on April 20, 1928, the Government of the French Republic circulated among the other interested Governments, including the Government of the United States, an alternative draft treaty, and that in an address which he delivered on April 28, 1928, before the American Society of International Law, the Secretary of State of the United States explained fully the construction placed by my Government upon the treaty proposed by it, referring as follows to the six major considerations emphasized by France in its alternative draft treaty and prior diplomatic correspondence with my Government:

"(1) Self-defense. There is nothing in the / American draft of an anti-war treaty which re- / stricts or impairs in any way the right of self- / defense. That right is inherent in every sovereign / state and is implicit in every treaty. Every nati- / on is free at all times and regardless of treaty / provisions to defend its territory from attack / or invasion and it alone is competent to decide / whether circumstances require recourse to war in / self-defense. If it has a good case, the world / (1)

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will applaud and not condemn its action. Express recognition by treaty of this inalienable right, however, gives rise to the same difficulty encountered in any effort to define aggression. It is the identical question approached from the other a le. Inasmuch as no treaty provision can add to th natural right of self-defense, it is not in the interest of peace that a treaty should stipulate a juristic conception of self-defense since it is far too easy for the unsc pulous to mold events to accord with an agreed lefinition. (2) (3)

"(2) The League Covenant. The covenant imposes no affirmative primary obligation to go to war. The obligation, if any, is secondary and attaches only when deliberately accepted by a state. Article 10 of the Covenant has, for example, been interpreted by a resolution submitted to the Fourth Assembly but not formally adopted owing to one adverse vote to mean that "it is for the constitutional authorities of each member to decide, in reference to the obligation of preserving the independence and the integrity of the territory of members, in what degree the member is bound to assure the execution of this obligation by employment of its military forces." There is, in my opinion, no necessary inconsistency between the covenant and the idea of an unqualified renunciation of war. The covenant can, it is true, be construed as authorizing war in certain circumstances but it is an authorization and not a positive requirement. (4)

. . . . . .

"(5) Relations with a treaty-breaking state.

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As I have already pointed out there can be no question as a matter of law that violation of a multilateral anti-war treaty through resort to war by one party thereto would automatically release the other parties from their obligations to the treaty-breaking state. Any express recognition of this principle of law is wholly unnecessary. (5)

. . . . . .

...my Government, for its part, remains convinced that no modification of the text of its proposal for a multilateral treaty for the renunciation of war is necessary to safeguard the legitimate interests of any nation. It belives that the right of self-defense is inherent in every sovereign state and implicit in every treaty. No specific reference to that inalienable attribute of sovereignty is therefore necessary or desirable. (6) It is no less evident that resort to war in violation of the proposed treaty by one of the parties thereto would release the other parties from their obligations under the treaty towards the belligerent state. This principle is well recognized. (7)

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VIII.

The British Secretary of State for Foreign Affairs (Chamberlain) to the American Chargé (Atherton)

(London,) July 18, 1928.

. . . . . .

As regards the passage in my note of the 19th May relating to certain regions of which the welfare and intogrity constitute a special and vital interest for our peace and safety, I need only repeat that His Majesty's Government in Great Britain accept the new treaty upon the understanding that it does not prejudice their freedom of action in this respect. (1)

I am entirely in accord with the views expressed by Mr.Kellogg in his speech of the 28th April that the proposed treaty does not restrict or impair in any way the right of self-defence, (2) as also with his opinion that each State alone is competent to decide when circumstances necessitate recourse to war for that purpose. (3)

. . . . . .

I have (etc.) Austen Chamberlain

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IX.

The Acting Commissar of the People for Foreign Affairs of the Union of Soviet Socialist Republics (Litvinoff) to the French Ambassador at Moscow (Herbette)

Here follows a copy of the original communication in French.

For the English translation, please see pp. 27 to 33 inclusive.

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. . . Le Gouvernement Soviétique a en outre toujours considéré et considère encore qu'l'nique moyen efficace d'éviter les conflits armés consiste à réaliser le programme du désarmement général et total, car dans l'atmosphère fièvreuse de l'armement général toute compétiéion entre Etats conduit infailliblement à la guerre, celle-ci étant d'autant plus meurtrière que le système des armements est plus perfectionné. Un projet détaillé de désarmement complet avait été proposé par la Délégation de l'Union Soviétique à la Commission Préparatoire de la Conférence du désarmement près de la Société des Nations, mais il ne trouva malheureusement pas l'appui de la majorité de cette Commission, y compris les Représentants de ces mêmes Puissances qui sont les premières signataires du Pacte de Paris. Le projet fut décliné bien que son acceptation et son application eussent signifié une garantie réelle de paix. (1) (2)

2. Ne voulant négliger aucune possibilité de contribuer à diminuer le fardeau des armements, écrasant pour les populations, le Gouvernement Soviétique après que les propositions de désarmement total eurent été déclinées ne refusa non seulement pas de discuter la réduction partielle des armements, mais intervint lui-même par l'intermédiaire de sa Délégation à la Commission Préparatoire avec un porjet détaillé de désarmement partiel, mais substantiel. Cependent le Gouvernement Soviétique doit malheureusement constater qu ce projet non plus n'a rencontré l'appui de la Commission Préparatoire

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qui démontra par là une fois de plus l'impuissance absolue de la Société des Nations dans le domaine du désarmement lequel mx est pourtant la garantie de paix la plus solide et le moyen le plus puissant pour abolir les guerres; ceci se déroula en face de la résistance manifesté aux propositions soviétiques de la part de presque tous les Etats qui les premiers ont signé le Pacte interdisant la guerre.

3. Tendant à réaliser sa politique de paix le Gouvernement Soviétique, outre sa défense systématique de la cause du désarmement s'était également adressé aux autres Gouvernement bien avant que surgisse l'idée du Pacte signé dernièrement à Paris, avec la proposition de renoncer par le moyen de pactes bilatéraux non seulement aux guerres prévues par le Pacte de Paris, mais à toute agression mutuelle et à n'importe quel conflit armé. Certains Etats, comme l'Allemagne. la Turquie, l'Afghanistan, la Perse et la Lithuanie acceptèrent cette proposition et conclurent avec le Gouvernement Soviétique des pactes appropriés, d'autres Gouvernements passèrent sous silence cette proposition et évitèrent d'y répondre, d'autres enfin la declinerent en donnant ce motif étrange que le fait de renoncer sans réserve aux agression ne serait pas compatible avec leurs obligations envers la Société des Nations. Cela n'empêcha d'ailleurs pas ces mêmes Puissances de signer de Pacte de Paris sans mentionner dans le texte même du Pacte l'intangibilité des obligations sus-mentionnées.

. . . . . .

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5. Tout d'abord le Gouvernement Soviétique ne peut pas ne pas exprimer son plus profond regret que le Pacte de Paris ne contienne aucune obligation quelconque concernant le désarmement. La Délégation Soviétique à la Commission Préparatoire de la Conférence du Désarmement a déjà eu l'occasion de déclarer que c'est seulement en reliant un pacte interdisant la guerre à la réalisation du désarmement total et général qu'on pourrait arriver à garantir effectivement le maintien de la paix universelle et qu'au contraire un traité international interdisant la guerre qui ne serait pas accompagné même de cette garantie élémentaire que présente la limitation des armements sans cesse en progression, resterait lettre morte sans aucune portée réelle. Les déclarations publiques faites récemment par certains signataires du Pacte de Paris concernant la continuation inévitable des armements même après la conclusion du Pacte sont bien la confirmation de ce qui précède. Les nouveaux groupements politiques internationaux qui ont surgi entre temps, spécialement en relation avec la question des armements navals, ont encore d'avantage confirmé cette thèse. C'est pourquoi la situation actuelle dicte maintenant plus que jamais la nécessité de prendre des mesures décisives dans le domaine du désarmement. (4) (5) (6)

6. En s'adressant au texte du Pacte le Gouvernement Soviétique juge nécessaire de signaler l'insuffisance de netteté et de clarté dans l'article 1er de la formule même inter- (7)

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disant la guerre, cette formule permettant des interprétations diverses et arbitraires. De son côté, le Gouvernement Soviétique estime que toute guerre internationale doit être interdite soit comme instrument de ce qui est appelé "politique nationale", soit comme moyen servant à d'autres fins, (par exemple à la répression des mouvements libérateurs des peuples, etc.). Selon le Gouvernement Soviétique il faut interdire les guerres non seulement dans l'interprétation juridique et formelle du mot (c'est-à-dire supposant la "déclaration de guerre" etc.) mais aussi les actions militaires telles que par exemple l'intervention, le blocus, l'occupation militaire de territoires étrangers, de ports étrangers, etc. L'histoire de ces dernières années connaît passablement d'actions militaires de ce genre qui ont déchaîné sur les peuples de formidables calamités. Les Républiques Soviétiques ont été elles-memes l'objet d'agressions semblables et à l'heure actuelle l'immense peuple chinois souffre d'agressions militaires prennent souvent l'ampleur de grandes guerres qu'il est alors complètement impossible d'arrêter et cependant le Pacte ne fait aucune mention de ces questions si graves du point de vue de la paix. Ensuite, le même article 1er du Pacte traite de la nécessité de résoudre toutes les discussions et tous les conflits internationaux, par des moyens exclusivement pacifiques. Partant de cette thèse, le Gouvernement Soviétique estime qu'il faut également ranger dans le nombre des moyens non

) (8)

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pacifiqués interdits par le Pacte des moyens tels que le refus de renouer des relations pacifiques normales entre les nations ou comme la rupture de ces relations, car des actes semblables en écartant les moyens pacifiques qui pourraient résoudre les différends enveniment les relations et contribuent à créer une atmosphère favorable au déchaînement des guerres. (9)

7. Parmi les restrictions faites par écrit lors des pourparlers diplomatiques entre les premiers signataires du Pacte, le Gouvernement Soviétique a spécialement fixé son attention sur la réserve du Gouvernement Britannique à l'alinéa 10 de sa note du 19 mai de cette année. Le Gouvernement Britannique s'y réserve une entière liberté d'action a l'égard de plusieurs régions qu'il énumère même pas spécialement. S'il s'agit de régions faisant partie de l'Empire Britannique ou de ses Dominions elles sont déjà toutes comprises dans le Pacte et le cas d'une agression dirigée contre eux est prévue par le Pacte, de sorte que la réserve du Gouvernement Britannique à leur égard pourrait paraître pour le moins superflue. Mais s'il s'agit d'autres régions, les signataires du Pacte ont le droit de savoir exactement où commence la liberté d'action du Gouvernement Britannique et où elle finit. (10)

Mais le Gouvernement Britannique se réserve toute liberté d'action non seulement en cas d'agression armée contre ces régions, mais même en cas de n'importe quel acte d'inimitié ou "d'immixion" qui justifieraient l'ouverture

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d'hostilités de la part du Gouvernement Britannique. Reconnaître un tel droit à ce Gouvernement consisterait à justifier la guerre et pourrait servir d'exemple contagieux aux autres signataires du Pacte qui, étant donné l'égalité de droit s'adjugeraient également la même liberté à l'égard d'autres régions et il en résulterait le fait qu'il n'y aurait probablement plus d'endroit sur le globe terrestre où le Pacte pourrait être appliqué. En effet, la restriction faite par le Gouvernement Britannique contient l'envitation adressée à un autre signataire du Pacte de soustraire à l'action de ce dernier d'autres régions encore. Le Gouvernement soviétique ne peut pas ne pas considérer cette réserve comme une tentative de faire usage du Pacte lui-même en qualité d'instrument de politique impérialiste. . . (11)

. . . . . .

8. Pour résumer ce qui précède, il reste à constater l'absence dans le Pacte d'obligations concernant le désarmement lequel reste l'unique élément essentiel pouvant garantir la paix; (12)

l'insuffisance et le vague de la formule même concernant l'interdiction de la guerre et enfin, l'existence de plusieurs restrictions (13)

ayant pour but d'écarter toute apparence d'engagement envers la cause de la paix. Néanmoins, (14)

pour autant que le Pacte de Paris impose aux Puissances certaines obligations a l'égard de l'opinion publique et donne au Gouvernement soviétique une nouvelle possibilité de poser devant tous ceux qui participent au Pacte la question la plus importante pour la cause de

Moscow, August 31,1928.

Mr.Ambassador: On August 27 you were so kind as to bring officially to my knowledge, under instructions from your Government, the fact that on that very day the Governments of the German Republic, the United States of North America, Belgium, France, Great Britain and its Dominions, Italy, Japan, Poland, and Czechoslovakia had signed at Paris a multilateral pact under which they undertake not to resort in their mutual relations to war as an instrument of national policy, but to solve the differences which might arise among them by exclusively pacific means.

. . . . . .

In giving, by this note, the answer of the Government of the U.S.S.R. to your inquiry, I have the honor to beg you, Mr.Ambassador, to communicate the following to your Government with the request that it will kindly transmit it to the Government of the United States of North America.

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. . . . . .

...The Soviet Government, furthermore, has always considered, and still considers that the one effective way of preventing armed conflict is to make a reality of the program of general and total disarmament, as in the feverish atmosphere of general armament any rivalry between states unavoidably leads to war, and that war is all the more bloody in proportion as the system of armaments is further perfected. A detailed plan of complete disarmament had been submitted by the Delegation of the Soviet Union to the Preparatory Commission of the Conference on Disarmament of the League of Nations, but unfortunately did not win the support of a majority of that commission, including the representatives of those very powers which are the original signatories of the covenant of Paris. The plan was rejected although its acceptance and enforcement would have meant a genuine guarantee of peace. (1) (2)

2. Unwilling to everlook any chance of contributing in lessening the burden of armament which is crushing the people, the Soviet Government, after the rejection of its propositions for total disarmament, not only did not decline to discuss the partial reduction of armaments but itself intervened through its Delegation in the Preparatory Commission with a detailed plan for partial but substantial disarmament. Yet the Soviet Government unfortunately must note that the plan also failed to find support in the Preparatory Commission, which once more so gave evidence of the total impotency of the League of Nations in

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the field of disarmament which, nevertholess, is the mostsubstantial guarantee of peace and the most powerful means of abolishing war; this took place in the face of the obvious resistance offered to the Soviet propositions by nearly all the states which were the first to sign the covenant forbidding war.

3. Aiming to bring into effect its policy of peace, the Soviet Government, besides its systematic defense of the cause of disarmament, had also addressed the other governments, long before the idea of the pact recently signed in Paris had been conceived, with the proposition to renounce through / bilateral covenants not only the wars referred to / (3) in the pact of Paris but any mutual aggression / and any armed conflict whatsoever. Certain states, such as Germany, Turkey, Afghanistan, Persia, and Lithuania, accepted this proposition and concluded appropriate pacts with the Soviet Government; other governments ignored this proposition and refrained from answering it; and again others rejected it on the peculiar ground that the fact of unreservedly renouncing aggression would be incompatible with their obligations to the League of Nations. That, however, did not prevent those same powers from signing the Pact of Paris without mentioning in the wording of the pact the sacredness of the above-mentioned obligations.

. . . . . .

5.First of all the Soviet Government can not refrain from expressing its most profound regret / that there is not in the Pact of Paris any obli- / (4) gation whatsoever as to disarmament. The Soviet / Delegation to the Preparatory Commission of the

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Disarmament Conference already has had occasion to declare that it is only by combining a pact forbidding war with total and general disarmament that it would be possible effectively to guarantee the maintenance of universal peace and that, on the other hand, an international treaty forbidding war, but not accompanied by even that elementary guarantee offered by the limitation of armaments, which are continuously increasing, would be a dead letter without any real significance. (5) (6)
The public declarations recently made by certain signatories of the Pact of Paris concerning the unavoidable continuance of armaments even after the pact is concluded fully prove the foregoing remarks. The new political international groups which have arisen in the meanwhile, especially in regard to the question of naval armaments, have added force to this theory. That is the reason why the present situation makes it more than ever imperative to take decided measures in the field of disarmament.

6. In considering the text of the pact the Soviet Government deems it necessary to point to the lack of plainness and clearness in article 1 of the very formula that forbids war, which is open to divergent and arbitrary interpretations. For its part, the Soviet Government believes that any international war must be forbidden either as an instrument of what is styled "national policy" or as a means to promote other ends (for instance, the repression of movements for liberating peoples, etc.). In the opinion of the Soviet Government, it is necessary to (7)

forbid not only wars in the juridical and formal / construction of the word (that is to say, assuming / (8) a "declaration of war," etc.) but also military ac- / tions such as, for instance, intervention, blockade, military occupation of foreign territories, of foreign ports, etc. The history of these last few years records quite a number of military actions of that kind which have brought upon peoples awful calamities. The Soviet Republics themselves have been attacked in that way, and at the present time the immense population of China is suffering from such aggression. Moreover, military actions of that kind often take on the magnitude of great wars which it then becomes completely impossible to stop, and yet the pact does not in any way mention those questions that are so grave from the standpoint of peace. Again, the same article 1 of the pact deals with the necessity of solving all arguments and all international disputes by means that are exclusively pacific. Taking this thesis as a basis, the Soviet Government believes that / there should also be classed among the nonpacific / means that are forbidden by the pact such means as / (9) a refusal to resume normal pacific relations between nations or the rupture of such relations; for acts of that character, by setting aside the pacific means which might decide differences, embitter relations and contribute to the creation of an atmosphere that is conducive to the outbreak of wars.

7. Among the restrictions made in writing at the time of the diplomatic pourparlers among the original signatories of the pact the Soviet Government paid particular attention to the reservation

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of the British Government in paragraph 10 of its note of May 19 of this year. The British Government there reserves to itself absolute freedom of actions in regard to several regions which it does not specially mention. If they are regions forming part of the British Empire or its Dominions, they are already all included in the pact, and the case of any aggression against them is provided for in the pact so that the reservation of the British Government in regard to them might seem to be at least superfluous. But if other regions are meant, the signatories of the pact have a right to know exactly where the freedom of action of the British Government begins and where it ends. (10)

But the British Government reserves to itself full freedom of action not only in cases of armed aggression against those regions but even in cases of any act whatsoever of enmity or "of interference" which would justify the British Government in opening hostilities. Recognition of such a right for that Government would amount to justifying war and might be taken as a contagious example to other signatories of the pact who, on the assumption that they have the same right, would also claim the same liberty with regard to other regions, and the result would be that there would probably be no place left on earth where the pact could be put in operation. Indeed, the restriction made by the British Government carries an invitation to another signatory of the pact to withdraw from its operation still other regions. The Soviet Government can not help regarding this reservation as an attempt to use the (11)

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pact itself as an instrument of imperialistic policy.

. . . . . .

8. Summing up the foregoing, I have still to note the absence from the pact of obligations concerning disarmament, which stands as the one essential element by which peace can be guaranteed; the inadequacy and vague character of the very formula about the inhibition of war; and finally, the existence of several restrictions aimed to cast aside any appearance of a promise for the cause of peace. (12) (13) (14)

Yet, in so far as the Pact of Paris lays upon the powers certain obligations as to public opinion and affords the Soviet Government another possibility to bring before all those who are parties to the pact the most important question for the cause of peace, that of disarmament, the solution of which is still the one guarantee which can ward off war, the Soviet Government expresses its willingness to adhere to the Pact of Paris.

. . . . . .

I take (etc.)

The Acting Commissar of the People
for Foreign Affairs
M. Litvinoff

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B.

DOCUMENTS

FOR THE INTERPRETATION AND APPLICATION OF THE BRIAND*KELLOGG PACT AND FOR THE DEVELOPMENT OF THE "SYSTEM OF COLLECTIVE SECURITY"

H1264 - 0036

I.

Declaration by Mr. Braga (Brazil): Proposal of measures to be taken by the member states to ensure a "universal juridical bloc". (*)

.....

In my opinion, if the 48 member states of the League of Nations were to adopt in their legislation juridical rules according to which the aggressor state would never have a right to war indemnities and reparations for war damage nor to the annexation of any territory taken from the state attacked, we would have taken a big step towards universal peace. That is why it would be useful for the members of the Leage of Nations to agree to introduce into their legislation urgently certain regulations which would ensure what you will allow me to call the universal juridical bloc. / (2)

As a result of the principles stated above, each member of the League of Nations would authorize his goverment to take the following measures.

a) .....

b) .....

c) .....

e) not to recognize in any case in its diplomatic and consular services the sovereignty of the aggressor state over usurped territories. / (3)

(*) Documents of the 2nd Ass., sessions of commissions, I. p. 396 ss.

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Gentlemen, in my opinion the creation of this international juridical order by 48 nations (such is the present number of members of the League) will lead to the reduction of armaments or will contribute greatly thereto. Armaments will then be limited in each country to the needs of internal order only: for any belligerent nation will understand that no war would get her advantages capable of making up for the harm caused by sanctions.

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Exh. 11

II.

1928, 7 Dec., Kellogg as Secretary of State before the House Committee for Foreign Relations of the US Senate:

"But how there can be a moral obligation for the United States to go to Europe to punish the aggressor or punish the party making war, where there never was such a suggestion made in the negotiation, where nobody agreed to it, and where there is no obligation to do it, is beyond me. I can not understand it.

As I see it, we have no more obligation to punish somebody for breaking the antiwar treaty than for breaking any one of the other treaties which we have agreed to."

(Hearings before the Committee on Foreign Relations U.S. Senate 70th Congress 2nd Sess., General Pact for the Renunciation of War, Part I, p. 21)

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III.

1929, 3 Jan., Senator Borah as chairman of the House Committee for Foreign Relations of the US Senate in his speech about the Kellogg-Briand Pact:

"The treaty is not founded upon the theory of force or punitive measures at any pl ce or at any time.....

There are no sanctions; the treaty rests in a wholly different philosophy.... (1)

In other words, when the treaty is broken the United States is absolutely free. It is just as free to choose its course as if the treaty had never been written." (3)

(U.S. Senate 70th Congress 2nd Sess., Rec., Part I, p. 1065)

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Exh. No. 13

IV.

1929, from 5 Jan. onwards:

Debates of the US Senate about the Pact of Paris in open session (extract) 1)

5 January:

(p.1179) Senator SWANSON

Mr. President, we are considering for ratification a treaty which has occasioned much difference of opinion. Its overzealous advocates have claimed that it abolishes or outlaws war and marks an epoch in the history of world affairs which will result in the consummation of perpetual peace. Its critics and opponents insist that it is a feeble gesture for peace, is worthless as a peace pact, and instead of outlawing war legalizes war, and that any war that has been conducted for centuries would be permissible under this so-called "peace-pact". (1)

.....

(p. 1186) Senator SWANSON:

In the same speech the Secretary of State, in speaking of the power of any government to exercise its inalienable right of self-defense, stated:

It alone is competent to decide whether circumstances require recourse to war in self-defense. (2)

Thus, it is universally acknowledged that all wars of

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1) Congress. Rec., Proceed. and Deb. of the 2nd Sess. of the 70th Congr. of the US. Vol. LXX - Part 2 (Jan. 5, 1929, to Jan. 26, 1929 (Pages 1169 sqq.)). Washington: 1929.

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self-defense are excluded from the operation of this treaty, and every nation determines for itself the question of self-defense. It should be noted that this question of self-defense is not limited to territory, but includes anything that any nation may determine is vital for its protection and self-defense. The wars excluded from the operations of this treaty by this interpretation are as limitless as the imagination or the ambition of nations may desire. It practically excludes from the operations of this treaty almost any war that has occurred in the last century. I hardly recall a war that has occurred during this period that the governments engaged did not claim to be a war of self-defense. Every government that engaged in the World War insisted it was waged on their part for self-defense. Thus, this treaty would have been wholly ineffective in restraining any of the governments that participated in the World War. This interpretation, given by the Secretary of State and acquiesced in by all the signatories, permits governments desirous of engaging in war to be unrestrained by this treaty, because all they will have to do is to claim it is a war of self-defense, and the interpretations of the treaty make them alone the judge of this question. Its significance as a solemn peace pact by these interpretations is seriously impaired.

(3) (4) (5)

.....

Mr. REED of Missouri:

Then, if this treaty would not have prevented the great World War, and would not have prevented any of the wars of the last 100 years, the sole benefit of the treaty must be merely that it is an expression of good will and of intent, and that is about all.

(6)

Mr. SWANSON:

That is what I believe it is, to be frank with the Senator.

Mr. REED of Missouri:

I believe it is, too.

Mr. SWANSON:

That is all I believe it is. I believe it is an expression of a desire in your heart of peace. Whether it is genuine or not, is for you to judge and the other nations to judge.

Mr. REED of Missouri:

In other words, we are to exchange a sort of international kiss. (7)

.....

(p. 1188) Mr. SWANSON:

.... Thus Great Britain would not under this treaty be prohibited from waging war in these regions of the world where she considers sheehas a vital interest. As Great Britain has interests in all parts of the world, this treaty would hardly restrain her in many conceivable cases. It is left to her decision and judgment under this understanding to determine what these interests are and where located. If this right belongs to Great Britain where she has special interests, it belongs equally to other nations. If Great Britain is unfettered and unrestrained by this treaty to wage war in China, Egypt, the Sudan, India, and Afghanistan, Italy is equally unrestrained in the Adriatic, and Italy and France are unrestrained in the Mediterranean and Africa, where they have special interests and possessions. (8) (8)

.....

(p. 1189) Senator SWANSON:

.... Mr. President, after mature consideration I have reached the conclusion that this treaty is a friendly gesture for peace, that as a peace pact it will be found

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ineffective and disappointing. No nation can rely upon it for protection. This is the view of President Coolidge, since in his Armistice Day speech, in which he mentions this proposed multilateral treaty, he strongly recommends an adequate Navy for national defense and the protecting of our great foreign interests and commerce. This pact has not been considered by him sufficient in its peaceful accomplishments to induce him to reduce in the least his demands for an increased Navy. His contention in this respect despite this treaty is wise and foreseeing. He apprehends the troubles and dangers which will accrue to us from deficient naval armaments. He wisely concludes it is better to trust our rights and security to naval ships than to this peaceful gesture, although concurred in by all nations. (9)

.....

Mr. McLEAN of Connecticut:

.... I think the American people and the rest of the world clearly should understand that this treaty attempts to do nothing more than express a mutual and sincere desire for peace. .... (10)

(p. 1190) McLEAN:

.... I need not discuss the racial, geographical, and economic reasons why a political supersovereignty with the vast and complicated judicial, legislative, and executive machinery necessary to its existence is still among the things that dreams are made of. And it is well to bear in mind that neither peace leagues nor world courts nor modifications of international law can abolish wars or rumors of wars without the aid of an international army and navy, operated in obedience to international decrees, delivered in sealed envelopes to international general and admirals. International wars and crimes and misdemeanors must be (11)

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abolished as the domestic varieties are abolished by superior force. Mere declarations and renunciations of war, solemn declarations abolishing war and agreeing not to fight are all alike impotent provided anyone wants to fight.

.....

.... The fact remains that the victors left the vanquished about as Rome left Carthage in the brave days of old. Our associates signed the covenant of the League of Nations, the declared purpose of which was to secure a rapid and radical reduction in the armies and navies of the great powers, and then they proceeded to increase their armies and navies. Later on, having agreed with us to reduce naval armaments of a certain type, they proceeded to strengthen their navies in other types. Having taken from Germany all of her colonial possessions and imposed reparation penalties to the limit and beyond, it was natural for our associates to want to continue that good old plan by which he shall take who has the power and he shall keep who can. It was natural, but it was wrong, and as yet we have seen no signs of repentance worth noting.

.....

I am calling attention to but few of the items which indicate that the kind of world peace for which it was claimed the war was fought has been forgotten or ignored by our victorious associates. In a word, anyone who cares to familiarize himself with the political, racial, and economic conditions imposed upon Europe by the treaty of Versailles must reach the conclusion that peace hallelujahs and other varieties of lip service will not prevent future wars so long as the great powers persist in sowing the seeds of war. The same motives that impelled France to want to keep what she took from Germany will justify Germany in seeking their recovery as soon as she is able.

(12) (13) (14)

France knows this and that is why shortly after the treaty of Versailles was ratified, France proposed a military alliance with the United States and Great Britain to maintain the status quo. (15)

The proposal was declined. Then France sent her armies into the Ruhr Valley, and when she failed to realize her purpose in doing this, France again came to us with a proposal that the two nations that had sustained peaceful relations for 150 years should promise to remain at peace, a clear indication that France might want our help for purposes other than those mentioned in the treaty. About two months ago Mr. Poincare, Mr. Chamberlain, and Mr. Parker Gilbert agreed with Germany that the Dawes plan of reparation should be revised, and it is there and to them that we must look for adjustments and compromises that will remove existing fears and secret vows of vengeance and help Europe to maintain political and industrial good will.

If we want good will, we must pay for it in the kind of currency that will buy it.

If Mr. Briand had gone east instead of west and promised Germany that he would do his best to bring about a modification of the unbearable terms of the Versailles treaty, he might have lost his job; but he would have gone into history as a genuine friend of peace; and if France had supported him, she would have commanded the admiration of the world and regained her historic reputation as a good sport and lover of fair play. But. Mr. Briand comes to us with his new pipe of peace. We suggest that it is a good time for all the braves to gather around the international wigwam and have a smoke. This they did, but, as might have been expected, they found a carload of coughs in the first puff of self-defense mixture, and (16)

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they declined the second puff until it was understood that it would not interfere with the free use of tomahawks and hatchets.

.....

(p. 1192): ~~Such~~ Mc LEAN:

We are already told by the nations that rule the waves that the value of this treaty will depend upon the extent to which we "backed it." Here again it is evident that it is protection and peace for the status quo that France and England want. Should Austria and Germany form a political union we would have an act of aggression forbidden by the league covenant. In this contingency should we maintain a tongue-tied neutrality, we would be denounced as slackers. Should we openly sympathize with or support in any way Germany and Austria in their desire to enjoy the self-determinatory privileges promised by President Wilson and others, a very serious situation would present itself.

.....

7 January:

(p. 1278/79) Mr. BRUCE:

There are several distinct views that may be taken of the practical value of this pact. One is that it is a mere empty interchange of mutual promises which begin and end in grandiloquent words.

.....

The idea of the pact is that should any party to it violate its covenants no pratical consequence whatever is to follow, except that, as respects that party, the other parties to the pact are to be released from all their obligations under it.

.....

All that talk about outlawry, all that talk about the adoption of an international code, all that talk about the establishment of an international court of justice, has apparently been relegated to oblivion. The word "outlawry" is now too virile, too robust, too militant a word, to accord with the present temper of the pacifist mind in this country.

.....

In other word, article 2 of the pact declares that no settlement of any international conflict or dispute shall be sought except by pacific means; and yet is totally silent as to the specific pacific means by which settlement is to be sought.

In spite, therefore, of "the active virtue" which the distinguished Senator from Idaho (Mr. Borah) assigns to article 2 of the Kellogg pact, one might well see nothing in it but the same uncertainty, the same vagueness, the same impotence which characterize article 1 of the pact. (18)

.....

(p. 1280) Mr. REED of Missouri:

Then the right of a nation to defend itself means the right to defend its citizens and their property?

Mr. BORAH:

Exactly; and, secondly, that whenever an emergency does arise whatever the facts are, the judgment as to whether it is an attack and as to whether we should exercise our right of self-defense or not, is solely with us. (19)

Mr. REED of Missouri:

As far as our action is concerned.

Mr. BORAH:

Yes.

Mr. REED of Missouri:

But other nations might say that we had acted unjustly

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or made a wrong decision.

Mr. BORAH:

Of course, they could claim that.

.....

(p. 1282): Mr. BRUCE:

Now, let me say that even if we look no further than the face of the Kellogg pact it is impossible to reach the conclusion that it has any real practical value for the purpose of confirming international peace. (20)

.....

But whatever the face value of the Kellogg peace pact may be, it has been largely destroyed by the interpretative notes which accompany it. It is admitted that the pact has no application to the right of national self-defense; and who, pray, ever heard of a nation waging any modern war that it did not stamp as a defensive war? How easily that can be done is evidenced by the fact that not a few highly searching minds outside of Germany have recently reached the conclusion that Germany, after all, was by no means the only aggressor in the World War. According to the ideas of this puerile - if I may use such an expression without offense - peace pact, should a nation violate it, and go to war, all it would have to say is, "I alone have the privilege of determining whether this is, in truth, a war of self-defense or not. I pronounce it a defensive war", and that is the end of the matter. (21) (22) It is admitted by the most conspicuous defenders of the Kellogg peace pact themselves.

Then, of course, confessedly excluded, so far as the advocates of the pact are concerned, from the operation of the pact, are wars that may be waged by the League of Nations, or by the parties to the Locarno treaties, or by

the parties to the neutrality pacts, into which France has entered, or by Great Britain against any country making an attack upon any region in which she believes that she has a peculiar interest, in any part of the world which she encircles with the continuous martial strains of her military bands. (23)

She has not thought proper to tell us in what particular regions of the earth she has such a peculiar special interest that any attack upon any one of them would be regarded by her as an attack upon herself. Is it Egypt? Is it the Suez Canal zone? Is it India? Or is it some other country or countries where her ubiquitous drumbeat is heard?

It has been said that we need pay no attention to the reservations of England with respect to those regions whatever they are; but how can that be reasonably contended? The English notes which accompany the Kellogg pact expressly, explicitly condition Great Britain's assent to the pact upon the understanding that she shall have entire freedom of discretion in dealing with any attack upon any one of those regions which she has now brought within the scope of a Monroe doctrine of her own. So I say that if the Kellogg peace pact ever did have any practical value for the purpose of staying the hand of war, it has none when the contracting effect of all the various reservations contained in the interpretative notes associated with it are duly taken into account.

I recall the fact that during the Spanish-American War one of our ambitious American officers complained that there was not enough war to go around, and so it seems to me that our friend, Mr. Kellogg, for whom I entertain the highest degree of personal respect, might well complain that as the result of those interpretative notes there is

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left very little war for the Kellogg peace pact to apply to.

I forgot to affirm that, in view of the express reservation of Great Britain in connection with her Monroe doctrine, it is idle to say that by signing the Kellogg peace pact the other parties to that pact, including ourselves, would not acquiesce in the reservation. That reservation, as the Senator from California (Mr. Johnson) has pointed out, is in the nature of a condition precedent to the assumption by Great Britain of any obligation whatsoever under the Kellogg pact, and if this has not been accepted by the other parties to that pact, then Great Britain has not become a party to the pact at all.

.....

8. Januar:

(p. 1333) Small Mr. BRUCE:

But, above all, I propose to vote for the ratification of the Kellogg pact because I agree with the statesmen of England and other European statesmen in believing that it at least measurably tends to draw our country into the only two institutions in the world to-day that hold out any real promise of international peace - that is to say, the World Court and the League of Nations. (24)

It is perfectly obvious to my mind that some of the Countries that have signed the Kellogg pact would never have done so had they not believed that it sets up a distinct, definite milestone for us on our way to the World Court and the League of Nations.

.....

(p. 1334) Mr. MOSES:

A dream, as generous as it is grandiose, fell upon the American negotiator; and the Briand proposal, in its pere-

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grinations between the Quai d'Orsay on the Seine and Executive Avenue on the Potomac, suffered a sea change into something rich and strange.

Even this could not have impeded our ratification if only the signatory powers to whom we presented the instrument had been content to take this treaty by its four corners and fold it to their breast.

•••••

But this, too, could not be. No sooner had the aggrandized treaty been laid before the powers of the world who were invited to give their adherence than they began with one accord to change notes with our secretary of State. The letter writing which this treaty has produced, Mr. President, is almost as if Lady Mary Wortley Montagu, in Protean form, had come to earth again and dwelt in most of the chancelleries of the Old World.

These notes bristle with what, in the earlier and more robust times of 1o years ago, would have been known as "reservations." Now, we are told, they are either "interpretations" or "understandings."

Whatever they are, they demonstrate that the Governments advancing them are keenly alive to their own interests. (25)

•••••

And to these we must add the most significant of the entire series of communications, the carefully prepared note dispatched by his Britannic Majesty's Principal Secretary of State for Foreign Affairs, Sir Auston Chamberlain, on the 19th of last May.

In this note Sir Auston, in numbered paragraphs sets forth the "understandings" upon which the British Government joins in making this splendid gesture proposed by the American diplomatic Delsarte. In Paragraph 1o - around which rages a discussion almost equal to that which centered about

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Article X of an earlier pact of somewhat similar import- Sir Austen sets up a Monroe doctrine for the British Empire. He does not shrink from displaying that sense of self-assertion which generally characterizes a British statement of a British position; and he employs language which, in a diplomatic document, has come to a fixed meaning. When he says it is desirable to remind the American Government that there are "certain regions of the world the welfare and integrity of which constitute a special interest" for the "peace and safety" of the British Empire, he stakes out a claim upon the seas and continents of the globe to which there are no metes and bounds and leaves himself and his successors free to post a "No trespassing" sign at any time. And he makes known further that his Government assents to this treaty "upon the distinct understanding that it does not prejudice their freedom of action in this respect."

(26)

.....

(p, 1335) Still Mr. MOSES:

... The question now arises, what are the exact limitations, qualifications, reservations, interpretations or "constructions" to use Secretary Kellogg's expression, which have been placed by the signatory powers to this momentous document?

(27)

.....

France has reserved complete liberty of action under its "treaties guaranteeing neutrality." Secretary Kellogg has stated that "the United States is not informed as to the precise treaties which France has in mind," though he can see no possibility of any inconsistency between their provisions and the present treaty.

.....

The United States, again, would appear committed in

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advance to a recognition of the legality of whatever action France may take under these treaties for the maintenance of the status quo and the preservation of the balance of power in Europe.

.. Great Britain by its notes of May 19, and July 18, 1928, has formally reserved complete freedom of action in "certain regions of the world the welfare and integrity of which constitute a special and vital interest for (its) peace and safety. His Majesty's Government have been at pains to make it clear in the past that interference with these regions can not be suffered." What these regions are and what measures may be contemplated to prevent "interference" can not be defined, but Great Britain conditioned its acceptance of the treaty on the recognition of its full freedom of action. There is nothing in the correspondence to indicate any intention to restrict this freedom. (28)

.. The signatories to the pact have reserved complete freedom of judgment and action concerning the right of self-defense. Secretary Kellogg states that: "Every nation is alone competent to decide whether circumstances require recourse to war in self-defense." Having refused originally to accept the proposal of France to restrict the renunciation of war to "aggressive" wars, the United States finally conceded the right to wage war in self-defense. No term would seem more difficult of definition than self-defense. It has been used to justify many wars, including offensive wars for defensive purposes. Does it warrant forcible interventions for the protection of aliens in danger? Does it include freedom of action by the United States under the Monroe doctrine? It would either seem to permit almost any use of force, or to require some limitation, if the treaty is to have any practical significance. (29)

.....

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(p. 1336) Still Mr. MOSES:

.... Sir Auston Chamberlain stated in the House of Commons on July 30, 1928, that the importance of the treaty depended on "How the rest of the world thought the United States was going to judge the aggressor, and whether they would help or hinder him in his aggression." (30)

.....

From the foregoing analysis of the terms and the interpretation of the treaty the following deductions would seem permitted: First, that the treaty, instead of abolishing war, actually legalizes war. Prof. E.M. Borchard of the Yale Law School was entirely correct when he told the Williamstown Institute of Politics that "the treaty, now qualified by the French and British reservations, constitutes no renunciation or outlawry of war, but in fact and in law a solemn sanction for all wars mentioned in the exceptions and qualifications," (31) (32)

It seems to me inescapable that our Government, by its acquiescence in these exceptions and qualifications, has committed itself in advance to an implied recognition of the legality of action taken by Great Britain, France, and other powers, either within the League of Nations or in accordance with other treaty obligations. This includes the application of sanctions by the league in disregard of American interests, and in some cases probably in disregard of American public opinion concerning the merit of such punitive measures. We certainly have not reserved our freedom of judgment and action regarding the application of these sanctions; and Europe believes that we are committed, not merely to a role of passive acquiescence, but even of active cooperation against disturbances of international peace. This amounts to the abandonment of any possibility of neutrality by the United States. It means that, in any (33) (33)

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future war involving the great European powers, the United States would be in no position to contend for the freedom of the seas. It would mean the triumph of the historic British claim to ignore neutral interests, It would virtually mean that, havingforfoited in advance any right of protest against action taken by Great Britain in accordance with its league obligations or ther rights reserved under the Kellogg treaty, the United States no longer would have any need of a navy other than for ordinary police duty. England and France may thus perfect their own naval understandings without any concern regarding the attitude of the United States, once we have ratified this treaty. (34)

The United States is now in the psition, either of acknowledging the full imp.ications of the treaty and committing itself whole-heartedly to all that it means in the light of the interpretations placed on record by the other powers, or of stating explicitly our own interpretations of the limitations and obligations we are prepared to accept. Professor Borchard is right in saying that our hands are tied, not the hands of Great Britain and France. "The reservations," he says, "are made at our expense, not theirs."

.....

(p. 1339) Mr. WAGNER:

... Here, at last, we have a treaty which may be said to have its birth in popular initiative and its approval in a popular referendum.

.....

The popular origin of the treaty has shaped its text. It is simple and brief, and it forcefully expresses a common aspiration. No precise rules of conduct are laid down. No definite standards of international behavior are established. No attempt is made to define or provide for the (35)

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various contingencies that might arise under it. It is not a legal document but a popular slogan. (36)

.....

(p. 1340) Still Mr. WAGNER:

...In the event of violation no machinery of enforcement is provided. No sanctions are established. A breach of the treaty does not bring upon the vidating state any consequences springing from the treaty.

.....

Neither does the treaty, strictly speaking, fit into the outlawry program. It creates no court. It provides no code. It does not denounce war as a crime. It merely renounces its use as an instrument of national policy. (37)

.....

(p. 1341) Still Mr. WAGNER:

...The discussion of sanctions under the treaty reveals more clearly than anything else how debatable are even the most elementary factors in a plan for a world free from war. The treaty has been ridiculed because it provides no sanction and no machinery or method of enforcement of the promises to refrain from war. It has likewise been challenged because it is said to impose upon the United States the duty to punish, by force of arms if necessary, a treaty-breaking state. This latter criticism is absolutely without foundation.

.....

We need pay little regard to farfetched or fantastic implications read into the treaty which have no basis in the language of the treaty. It is natural to assume that when nations speak in so formal a manner as a treaty that they do not assume obligations beyond those plainly stated.

.....

The treaty fails to denounce war as a crime. It fails to outlaw war. The nations have not yet legally contracted not (38)

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to go to war. No instrument can well be a contract which as a practicable measure is terminable at the will of any party and which, if broken, calls for nothing more than the resumption of the old order.

.....

9. Januar.

(1401) Mr. BLAINE:

...I also observe that the treaty is so sublime that we propose to enter into a competitive struggle in supplying ourselves with implements of war and destruction. Beautiful sentiments are uttered, full of great possibilities for the onrush of emotionalism, but the treaty itself, / weighted down by the reservations, contains the fertile / (39) soil for all the wars of the future. /

.....

We can not promote peace by mere words. Slogans have never saved civilization. Slogans have had their blighting curse in all governments and in all times.

We heard much during the World War of making the world safe for democracy, of putting an end to all wars. We now all know that it was a lie, and every slogan a lie.

Slogans are designed for the purpose of falsehood; they are the instruments of tyranny. We will outlaw war when we recognize realities and deal with realities instead of writing beautiful phrases and manufacturing slogans, the fabric of which future generations will know is falsehood. We will outlaw war when and only when we outlaw the causes / of war. /

.....

(p.10402) Still Mr. BLAINE:

A study of the proposed treaty and the diplomatic notes exchanged during its negotation, to my mind, can lead to

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but one conclusion, namely, that it is a one-sided declaration of British policy. (41)

While the Kellogg treaty is couched in idealistic phrases it is but a pious declaration interspersed with pretenses and hypocrisy in a maze of reservations and interpretations. This formula for peace proposes to stabilize and legalize the spoils of war obtained by the greatest empire of the world. The peace designed by this treaty is the peace of the status quo of the Versailles treaty. (42)

.....

I ask, sir, what war is renounced?

It is clear that, with the interpretative notes and reservations, there is no renunciation of war.

.....

There is no renunciation of war whenever the British Government decides that she has a special and vital interest in any portion of the world. (43)

.....

(p. 1403) Still Mr. BLAINE:

I am sure that we can not fairly interpret the British note by any claim that paragraph 10 is a specific paragraph dealing with specific matters outside of and beyond all questions of self-defense. (44)

.....

That is the instrument of an assailant and not the reservation of a pacific man or nation.

.....

Mr. KING:

...every country signing the multilateral treaty is the sole and exclusive judge of what the right of self-defense is, (45)

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(p.10406) Mr.BLAINE:

...President Wilson went to Paris and brought back Article X of the League of Nations. Secretary Kellogg went to Paris and brought back paragraph 10 of the British note. / I repeat, what Great Britain did not accomplish under Ar- /(46 ticle X of the league she proposes to consummate under pa- / ragraph 10 of the British note. /

.....

(p.10407) Still Mr.BLAINE:

...Those causes of war to which I have referred are augmented by the terms of the harsh and unconscionable trea- / /(47 ty of Versailles and the extension of Article X of the Lea- / gue of Nations by paragraph 10 of the British note.

...

This pact commits our Nation to an impossible peace, unworthy of the traditions of America, and forgetful of that which made this Republic possible.

...

(p.1412) Mr.WALSH of Massachusetts:

...During the time this treaty has been under consider- / ation, namely, since June, 1927, not one less war machine / or implement of war has been produced. On the contrary, / more money has been appropriated and larger militaristic / programs elaborated during this period than in any other (48) / period since the World War. The Republic of France is to- / day maintaining a larger armed force, with Germany disarmed,/ than it did in 1914 when Germany was armed. /

...

(p.1413) Still Mr. WALSH:

... I shall vote for the ratification of this treaty not because I am entirely certain that it is a real, genuine movement that will materially advance the ending of war and

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the promotion of peace of the world but because if the United States fail to ratify it now in view of their participation in the international negotiations that have brought it into being, would be misunderstood. It would place the United States, regardless of her sincere and profound desire and purpose to bring about peace in the world, in the position of an obstructionist to such a movement. The pact itself is nothing more than a statement of principle.

.....

No one claims that any paper treaty can absolutely guard against war; but law can help to that desired end. This document is but a scrap of paper unless there is behind it the good faith of the rulers and people of the respective nations. Frankly, the haste and zeal with which they have sought to reserve to themselves excuses for future wars is disappointing to those who realize that without good faith the whole business is a gigantic piece of hypocrisy, temporarily narcotizing innocent and serious-minded lovers of peace.

.....

(p. 1415) Mr. Mc KELLAR:

.... Everyone admits that there is no way of enforcing the treaty, and everyone admits that each nation shall be the judge of whether it has violated the treaty.

.....

In my judgment the peace of the world can only be permanently secured by the United States and Great Britain each having a Navy equal in size, in armament, and in power, so that neither will be able to go to war with the other, with an agreement that each will keep the peace. Whenever this is brought about it will be easy for these two great English-speaking peoples not only to secure but to enforce the peace of the world. Whenever this is done it will be easy

to secure a real limitation of armament. In my judgement it is the only way in which the permanent peace of the world can be secured.....

(p. 1467) Mr. BINGHAM:

Well, Mr. President, it seems to me there is no question about the fact that opinions on this treaty differ as widely as the poles. I have been told by one Senator on this floor - not for publication - that he would vote for the treaty because he believed that if we ratified the treaty we could not send our cruisers into the heart of China, and we could not send cruisers and marines to Nicaragua in the case of disturbance, and we could not do a lot of things that he objects to our having done in the last few years. On the other hand, I have been told by another Senator that he is going to vote for the treaty because he believes it means nothing, and is merely a gesture, and does not restrict our action, in any sense at all.

(57)

I have been told by still another Senator that believed that if this treaty meant exactly what it said there would not be a dozen Senators on the floor to vote for it.

In other words, there is the very greatest divergence of opinions, Mr. President, even among Senators. In the United States we find an equal divergence of opinion among thinking men. Therefore it seems to me that it is very important that something is done to put us definitely on record, without equivocation, as to what the treaty means. Otherwise, I believe that in the future we shall be accused of rank hypocrisy, of bad faith, and of deceiving the nations of the world by our action in ratifying the treaty.

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Exh. No. 14

V.

Report of the House Committee for Foreign Relations of the US Senate to the Senate regarding the Kellogg-Briand Pact, presented on the 15 Jan.1929.

It is stated there regarding the question of Sanctions:

"The committe further understands that the treaty does not provide sanctions, express or implied. Should any signatory to the treaty or any nation adhering to the treaty, violate the terms of the same, there is notobligation, or commitment, express or implied, upon the part of any of the other signers of the treaty to engage in punitive or coercive measures as against the nation violating the treaty. The effect of the violation of the treaty is to relieve the other signers of the treaty from any obligation under it with the nation thus violating the same."

(U.S.Senate 70th Congress 2nd Sess., Senate Rep. Nr. I, p.2)

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VI.

1929, 1st march, Aristide Briand, the Minister for Foreign Affairs, regretfully states in his speech before the Chamber that sanctions are lacking for the Kellog-Briand Pact:

" It would have been impossible for them to have brought to a successful conclusion, as perfect a contract as you could wish for, against war, with an arbitrating organization and sanctions."
(Official Journal, parl, debates, Chamber 1929, p. 769).

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VII.

Procopé (Finland) declares at the 9th League Assembly at Geneva:

(Documetns of the 9th Assembly, P., p.75)

" Article 10, however, also implies another obligation which must be mentioned. One can and must deduce from this article the conclusion that the members of the League of Nations, cannot recognize as trial and valid a situation which was the result of an aggression or, in general, of an act contrary to the rule sanctioned by Article 10".

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Exh. No. 17

VIII.

Report of the Committee to amend the covenant of the League of Nations with the aim of bringing it into harmony with the Pact of Paris. (*)

Official No : A.8.1930.V.

Geneva, 8 march 1930

The committee appointed by the Council in its session of January 1930, in execution of the Assembly's resolution of the 24 sept.1929, met at Geneva from the 25 Feb 1930 to the 5 March 1930.

. . .

The Committee's attention was drawn by certain of its members to the point of knowing if, in case of resistance to aggression or the carrying out of measures of international policing, the right to wage war (jus belli) would remain applicable. Once could in fact doubt whether, in such a case it would be a case of a real war. In the opinion of the Committee, by whatever name such operations are called, the rules of the right to wage war preserve their validity.

(*) (Docs. of the 9th Assembly, c.I., p.104. cf. record of the Committee to amend the covenant- No.C 160. M.69. 1930. V.)

IX.

1932, 7 January:

Note from Secretary of State Stimson to the Governments of China and Japan.*)

(Extract).

.....

With the recent military operations about Chinchow, the last remaining administrative authority of the Government of the Chinese Republic in South Manchuria, as it existed prior to September 18,1931, has been destroyed. The American Government continues confident that the work of the neutral commission recently authorized by the Council of the League of Nations will facilitate an ultimate solution of the difficulties now existing between China and Japan. But in view of the present situation and of its own rights and obligations therein, the American Government deems it to be its duty to notify both the Imperial Japanese Government and the Government of the Chinese Republic that it can not admit the legality of any situation de facto nor does it intend to recognize any treaty or agreement entered into between those Governments, or agents thereof, which may impair the treaty rights of the United States or its citizens in China, including those which relate to the sovereignty, the independence, or the territorial and administrative integrity of the Republic of China, or to the international policy relative to China, commonly known as the open-door policy; and that it does not intend to recognize any situation, treaty, or agreement which may be brought about by means contrary to the covenants and obligations of the Pact of Paris of August 27, 1928, to which treaty both China and Japan, as well as the United States, are parties.....

*) Dept. of State, Press Releases vom 9. Jan. 1932,p.41.

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Resolution of the 11 March 1932 of the Extraordinary Assembly convened at the request of the Chines Government. 1)

"The Assembly,

Considering that the regulations of the covenant are entirely applicable to the present dispute and that this is particularly the case:

1. With the principle of scrupulous respect of treaties;

2. With the engagement entered into by the members of the League of Nations to respect and maintain, against all aggression from without, the territorial integrity and present political independence of all the members of the League;

3. With their obligation to submit all disputes arising between them to the procedure of peaceful settlement.

Adopting the principles formulated by the acting President of the Council, M.Briand, in his declaration of the 10 December 1931.*)

Recalling that 12 members of the Council invoked these principles again in their appeal to the Japanese government on the 16th Feb. 1932. **), declaring "that no encroachment of the territorial integrity and no assault on the political independence of a member of the League of Nations committed in breach of Article 10 could be recognized as valid and effective by the members of the League";

Considering that the principles governing international relations and the pacific settlement of disputes between the members of the League recalled above are in full harmony with the pact of Paris which constitutes one of the pillars of the organization of world peace and of which article 2 stipulates that the "High Contracting Parties recognize that the settlement or solution of all disputes or conflicts, of whatever nature or origin they may be, which may arise between

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them, must only be sought by pacific means;

While waiting forthe measures which it may finally take to settle the dispute of which it has been informed;

proclaims the obligatory nature of the above mentioned principles and regulations and declares that the members of the League of Nations are obliged not to recognize any situation, treaty or agreement which may be obtained by means contrary to the covenant of the League of Nations or the Pact of Paris."

---

1) Docs. of the extraordinary assembly (Official Journal, special supplement, No. 101, p.87).

*) See Official Journal, Dec. 1931, p.2375.

**) " " " , March 1932 (Part 1) p.383.

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XI.

1932, 8. August:

"The Pact of Paris. Three Years of Development."
Address delivered by the Honorable Henry L. Stimson, Secretary of State, before the Council on Foreign Relations.
(New York City, Aug.8,1932.)

"Four years ago the United States joined with France in the initiation of the so-called Briand-Kellogg Pact for the Renunciation of War. A year later, in 1929, the Pact became formally effective, and it has now been adhered to by 62 nations. Scarcely had its ratification been announced on July 24, 1929, when it became subjected to the first of a series of difficult challenges which are still going on. In the defense of the Pact in these tests the American Government has been a leader. I believe it would be appropriate, in the light of this three years' history, to take stock now of what the Pact is, the direction in which it is developing, and the part which we may hope that it eventually will play in the affairs of the world. (1)

.....

Before this war was over it began to be called "a war to end war," and at the Peace Conference at Versailles the victorious nations entered into a covenant which sought to reduce the possibility of war to its lowest terms. The League of Nations Covenant did not undertake entirely to proscribe wars between nations. If left unrestricted a zone in which such wars might occur without reprobation. Furthermore, it provided under certain circumstances for the use of force by the community of nations against a wrongdoer as a sanction. (2) (3) It created a community group of nations pledged to re-

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strict war and equipped with machinery for that purpose. Some of this machinery, notably article 11, which provides, on a threat of war, for the calling of a conference for purposes of conciliation, has on several occasions proved a valuable influence in the prevention of war. Another important and beneficent result of the League organization has been the regular conferences which are held between the representatives of the different nations. These dicussions have proved to be effective agencies for the settlement of controversies and thus for war prevention. By them there also has been developed, particularly among the nations of Europe, a community spirit which can be evoked to prevent war. In all of these ways there has been produced the beginning of a group sentiment which is wholly at variance with some of the old doctrines in respect to war.

Nine years later, in 1928, came the still more sweeping step of the Pact of Paris, the Briand-Kellogg-Pact. In this treaty substantially all the nations of the world united in a covenant in which they renounced war altogether as an instrument of national policy in their relations with one another and agreed that the settlement of all disputes or conflicts of whatever nature among them should never be sought except by pacific means.

The change of attitude on the part of world public opinion towards former customs and doctrines, which is evidenced by these two treaties, is so revolutionary that it is not surprising that the progress has outstripped the landmarks and orientation of many observers. The treaties signalize a revolution in human thought, but they are not the result of impulse or thoughtless sentiment. At bottom they are the growth of necessity, the product of a consciousness that unless some such step were taken modern civilization would be dommed. Under its present

(4)

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organization the world simply could not go on recognizing war, with its constantly growing destructiveness, as one of the normal instrumentalities of human life. Human organization has become too complex, too fragile, to be subjected to the hazards of the new agencies of destruction turned loose under the sanction of international law. So the entire central point from which the problem was viewed was changed. War between nations was renounced by the signatories of the Briand-Kellogg Treaty. This means that it has become illegal throughout (5) practically the entire world. It is no longer to be the (6) source and subject of rights. It is no longer to be the (7) principle around which the duties, the conduct, and the rights of nations revolve. It is an illegal thing. Hereafter when two nations engage in armed conflict either (8) one or both of them must be wrongdoers - violators of this general treaty law. We no longer draw a circle about them and treat them with the punctilios of the (9) duelist's code. Instead we denounce them as law-breakers.

By that very act we have made obsolete many legal precedents and have given the legal profession the task of reexamining many of its codes and treatises.

The language of the Briand-Kellogg Treaty and the contemporaneous statements of its founders make its purpose clear. Some of its critics have asserted that the Pact was really not a treaty at all; that it was not intended to confer rights and liabilities; that it was a mere group of unilateral statements made by the signa- (10) tories, declaring a pious purpose on the part of each, of which purpose the signatory was to be the sole judge and executor, and for a violation of which no other signatory could call him to account.

If such an interpretation were correct, it would

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reduce the Pact to a mere gesture. If its promises conferred no rights as between the members of the community of signatories, it would be a sham. It would be worse than a nullity, for its failure would carry down the faith of the world in other efforts for peace.

But such critics are wrong. There is nothing in the language of the Pact nor in its contemporaneous history to justify such an interpretation. On its face it is a treaty containing definite promises. In its preamble it expressly refers to the "benefits furnished by this treaty," and states that any signatory power violating its promise shall be denied those benefits. The correspondence of the framers of the treaty shows that they intended it to be a treaty which would confer benefits, which might be lost by a violation thereof.

.....

As it stands, the only limitation to the broad covenant against war is the right of self-defense. This right (11)
is so inherent and universal that it was deemed unnecessary even to insert it expressly in the treaty. It is also
so well understood that it does not weaken the treaty. It (12)
exists in the case of the individual under domestic law,
as well as in the case of the nation and its citizens under the law of nations. Its limits have been clearly de- (13)
fined by countless precedents. A nation which sought to
mask imperialistic policy under the guise of the defense
of its nationals would soon be unmasked. It could not long
hope to confuse or mislead public opinion on a subject so
well understood or in a world in which facts can be so
easily ascertained and appraised as they can be under the
journalistic conditions of to-day.

The Briand-Kellogg Pact provides for no sanctions of (14)
force; It does not require any signatory to intervene with
measures of force in case the Pact is violated. Instead

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it rests upon the sanction of public opinion, which can be made one of the most potent sanctions of the world. Any other course, through the possibility of entangling the signatories in international politics, would have confused the broad, simple aim of the treaty and prevented the development of that public opinion upon which it most surely relies. Public opinion is the sanction which lies behind all international intercourse in time of peace. Its efficacy depends upon the will of the people of the world to make it effective. If they desire to make it effective, it will be irresistible. Those critics who scoff at it have not accurately appraised the evolution in world opinion since the World War. / / / (15)

From the day of its ratification on July 24, 1929, it has been the determined aim of the American Government to make this sanction of public opinion effective and to insure that the Pact of Paris should become a living force in the world. We have recognized the hopes which it represented. We have resolved that they should not be disappointed. We have recognized that its effectiveness depends upon the cultivation of the mutual fidelity and good faith of the group of nations which has become its signatories, and which comprises virtually all of the nations of the world. We have been determined that the new order represented by this great treaty shall not fail. ....." / / / (16)

/ (17)

/ (18)

...."These successive steps can not be adequately appraised unless they are measured in the light of the vital change of point of view which I have described

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in the opening of this address. They were the acts of nations which were bound together by a new viewpoint towards war, as well as by covenants which made that viewpoint a reality. Except for this new viewpoint and these covenants, these transactions in far-off Manchuria, under the rules of international law theretofore obtaining, might not have been deemed the concern of the United States and these 50 other nations. Under the former concepts of international law, when a conflict occurred, it was usually deemed the concern only of the parties to the conflict. The others could only exercise / and express a strict neutrality alike towards the injured / (20) and the aggressor. If they took any action or even / expressed an opinion, it was likely to be deemed a hostile act towards the nation against which it was directed. The direct individual interest which each nation has in preventing a war had not yet been fully appreciated, nor had that interest been given legal recognition. But now under the covenants of the Briand-Kellogg Pact such a conflict becomes of concern to everybody connected with the Pact. All of the steps taken to onforce the treaty must be judged by this new situation. ..."

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1932, 12 August:

Statement by the French Prime-Minister Herriot: °)

"I have studied the honourable Mr. Stimson's speech with all the more interest as the Briand-Kellogg Pact, which has outlawed war, is a work which is at the same time American and French, and because, since it was concluded, European opinion has not ceased to wish for its development. (1)

The French government is therefore extremely attentive and favourable to anything that can increase the authority of this pact.

In this so interesting speech of Mr. Stimson I recognized once more the sincerity with which the honourable Mr. Stimson wishes to give to the pact its full efficacity by bringing discussions about in such a case.

It is precious to us to hear it said that, in the mind of the American statesman, the fact already contains in itself the necessity for such discussions.

Under his high moral authority, this eminent politician has not feared to engage the entire American people in the recognition of such an obligation.

France, for her part, strongly believes that it is impossible, in the interests of peace, to ~~th~~ let the pact (2)

°) The New Europe, No. 760, 3 September 1932, p. 1062.

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retain the nature of a declaration of good intentions. France, too, and this is what makes her appreciate Mr. Stimson's declaration so greatly, intends to consider this pact as an obligation treaty. It is essential that this pact should be understood as binding the signatory countries without any restriction except case of legitimate defence. And we are grateful to the United States for proclaiming that they will not abstain from prescribing a document of such value not only politically but morally. (3)

Besides this, as soon as I have the complete and official text of Mr. Stimson's speech, I reserve the right to study it in the greatest detail with the respect it deserves.

We will examine loyally, for our part and in the interests of all, how one should proceed to ensure that the solemn undertakings of the pact can not be transgressed. But I wish without further delay, to declare personally how interested I was in the general inspiration of Mr. Stimson's speech and in his evident wish to reconcile with the liberty of decision dear to his heart the necessity for sincere international cooperation for the maintenance of peace. When responsible men of good faith study so serious a problem with the same conscientiousness, it is impossible that they should not meet. That is why the government at whose head I am, itself reoccupied with guaranteeing to all nations the security of their work, pays so much attention to the speech pronounced by the honourable Secretary of State of the United State and wishes to thank him for it publicly."

page 2.

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Non-aggression and conciliation pact: signed at Rio de Janeiro. 10 October 1933.*

The states mentioned below, having in mind to contribute to the consolidation of peace and to adhere to the efforts made by all civilized nations to develop the spirit of universal harmony;

With the aim of condemning wars of aggression and territorial acquisitions obtained by means of conquest / (1) by force of arms by making them impossible and by placing sanctions on illegality by the positive dispositions of this treaty, to substitute for them peaceful solutions based on the noble ideas of justice and equity;

Convinced that one of the most efficacious means of ensuring the moral and material benefits which peace offers the world, is the organization of a permanent system of conciliation of international conflicts which is applied as soon as a violation of the above-mentioned principle takes place;

Decide to put these plans of non-aggression and concord into the form of a convention by concluding the present treaty....

.....

Article 1.

The High contracting parties, solemnly declare that they condemn wars of aggression in their mutual relations or against other States, and that the settling of conflict or differences of whatsoever nature which may arise between them must not be done in any other way than by the peaceful means consecrated by International Law.

---

*) French translation of the Bulgarian Legal Code Durzaven Vestnik, 17 Dec. 1934, No.212).

Article 2.

They declare that, between the High contracting Parties, territorial questions must not be resolved by violence and that they will recognize no territorial settlement unless it is obtained by peaceful methods, nor the validity of the occupation or acquisition of territories carried out by force of arms. / (2)

Article 3.

In case any one of the States in conflict fails to carry out the obligations contained in the above articles, the Contracting States undertake to employ all their efforts for the maintenance of peace. To this effect, they will adopt a common attitude of solidarity in their quality as neutrals; they will put into effect the political, juridical or economic measures authorized by International Law; they will use the influence of public opinion without having recourse in any case to intervention, whether diplomatic or armed; except for the attitude which may be imposed upon them by virtue of other collective treaties of which these States might be signatories. / (3)

.....

Article 16.

The present Treaty remains open for the adhesion of all States.

.....

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XIV.

1934, 10 September:

*)
Budapest Articles of Interpretation.

The Conference of the Association held in Budapest, September, 1934, agreed upon the following preliminary Articles of Interpretation of the Briand-Kellogg Pact, to be known as the Budapest Articles of Interpretation: -

"Whereas the Pact is a multilateral law-making treaty whereby each of the High Contracting Parties makes binding agreements with each other and all of the other High Contracting Parties, and

Whereas by their participation in the Pact sixty-three States have abolished the conception of war as a legitimate means of exercising pressure on another State in the pursuit of national policy and have also renounced any recourse to armed force for the solution of international disputes or conflicts: -

(1) A signatory State cannot, by denunciation or non-observance of the Pact, release itself from its obligations thereunder.

(2) A signatory State which threatens the resort to armed force for the solution of an international dispute or conflict is guilty of a violation of the Pact.

(3) A signatory State which aids a violating State thereby itself violates the Pact. (1)

(4) In the event of a violation of the Pact by a resort to armed force or war by one signatory State against another, the other States may, without thereby committing a breach of the Pact or of any rule of International Law, do all or any of the following things:- (2)

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(a) Refuse to admit the exercise by the State violating the Pact of belligerent rights, such as visit and search, blockade etc.; (3)

(b) Decline to observe towards the State violating the Pact the duties prescribed by International Law, apart from the Pact, for a neutral in relation to a belli e- rent; (4)

(c) Supply the State attacked with financial or material assistance, including munitions of war; (5)

(d) Assist with armed forces the State attacked. (6)

(5) The signatory States are not entitled to recognize as acquired de jure any territorial or other advantages acquired de factor by means of a violation of the Pact. (7)

(6) A violating State is liable to pay compensation for all damage caused by a violation of the Pact to any signatory State or to its nationals. (8)

(7) The Pact does not affect such humanitarian obligations as are contained in general treaties, such as The Hague Conventions of 1899 and 1907, the Geneva Conventions of 1864, 1906 and 1929, and the International Convention relating to the Treatment of Prisoners of War, 1929." (9)

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*) International Law Association: Briand-Kellogg Pact of Paris, London 1934, p. 63 ss.

H1264 - 0080

H1264 – 0081

1935, 20 February:

The Lord Chancellor (Viscount Sankey) states in the House of Lords regarding the "Budapest Articles" of the International Law Association: *)

"... It is necessary to emphasise at the outset of my remarks that the Conference, whatever the weight of its authority, and whatever consideration is due to its conclusions, was a purely private and unofficial conference. Its members were expressing, quite rightly from their point of view, their own views: they did not necessarily represent the opinion of lawyers in all their own countries, still less the opinions of their Governments. The Briand-Kellogg Pact was deliberately drafted in broad terms, and its authors wisely declined to be drawn into attempts at precise definitions. While it is possible, as the Budapest Conference has shown, to obtain agreement on its interpretation among a group of international lawyers, it does not follow that all the Governments concerned would be ready to accept all the articles of interpretation which were adopted by the Conference. ....

.... I am sure noble Lords will agree that it is not desirable, in view of the far-reaching importance in international relations of the Pact which we are discussing, for his Majesty's Government to attempt to give their imprimatur to any particular article of interpretation adopted by the Budapest Conference, or to embark at the present moment in answer to this Question on any public discussion of the weighty issues which these articles raise."

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*) (Parl. Deb., H.L., 5th ser., vol. 95, cols.1007, 1043.)

H1264-0082

XVI.

1935, 10 October

Reservations of the Swiss Delegation (M.Motta)." 1)

"The Swiss Delegation has tacitly associated itself, in conformity with the Procedure suggested by the Office of the Assembly and adopted by the latter, with the findings of the States who are members of the Council. These findings open the door to the sanctions foreseen by article 10 of the Covenant. Up to now no one, except one of the parties directly involved, has alluded to sanctions by force properly so called. The Swiss Delegation notes this important fact. The other class of sanctions is that of economic and financial sanctions. By their character / (1)
and by their aim, the latter do not intend to be and are not in our eyes, hostile acts. They tend to exercise a moral and above all material constraint on one of the parties in order to bring it to reestablish peace.

The Swiss Confederation will not fail in its duty of solidarity with the other members of the League of Nations. Respect for engagements entered into and fidelity to treaties freely concluded are maxims which, for it, do not / (2)
suffer discussion. Its policy has always been, and will always be, loyal clear, and straight.

The statute of the Swiss Confederation remains dominated, as far as its foreign relations are concerned / (3)
by the principle of neutrality. This springs from the history, traditions, written institution and ethnic composition of the country. This neutrality is incorporated into international law; it was recognized as conforming to the interests of Europe to begin with, and later to those of the whole world; the Declaration made in

London by the Council of the League of Nations on the 13th February 1920 confirmed this in solemn terms. The Confederation would not have accepted entry into the League of Nations if the price of its participation had had to be to abandon its centuries-old statute. All that we have seen, observed and experienced at Geneva since 1920 has confirmed us in the persuasion that our attitude was wise. / (4)

Since then, our general obligation of participating in economic and financial sanctions, to the exclusion of all participation in military sanctions, is not absolute and should be interpreted in the light of the resolutions of 1921 (*) concerning the economic weapon. The limits of our obligation are determined by our neutrality which constitutes in our eyes, a fundamental principle and, at the same time, a vital interest. We do not consider ourselves bound to sanctions which, by their nature and effects, would expose our neutrality to a real danger which we have to judge with full sovereignty. / (5)

1) Docs of the XVI. Assembly, pl. p. 106

*) see Official Journal, Special supplement, No. 6, p. 24.

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XVII

1936, 17 January:

Secretary of State Hull declares before the Committee for Foreign relations of the United States Senate:

"The Neutrality law is based on the assumption that, should this nation become the base on a large scale for deliveries of war material to any belligerent nation, this would have the tendency of creating an unneutral atmosphere, and would finally tend to draw us into the war."

(New York State Newspaper 17 January 1936)

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XVIII.

1937: 6. November:

Rede des schwedischen Aussenministers Sandler in Upsala. (Auszug) *)

Man spricht ueber die Unklarheit, ob Schweden gegenwaertig eine Voelkerbunds- oder Neutralitaetspolitik betreibt, und ueber die Herbeifuehrung einer endgueltigen Entscheidung in dieser Frage. Der Leitung der schwedischen Aussenpolitik wird eine bedauerliche Passivitaet vorgeworfen, weil sie keine voellige Klarheit ueber die Pflichten schaffe, die Schweden als Voelkerbundsmitglied obliegen. Wenigstens hat man der schwedischen Aussenpolitik die belgische Politik und ihre Erfolge in juengster Zeit als vorbildliches Beispiel entgegengehalten.

.....

Das Hauptthema der Presseerorterung ist jetzt aber nicht die Mitgliedschaft selbst, sondern die Frage, wie man sich zu den sich aus ihr ergebenden Verpflichtungen verhalten solle. Natuerlich werden auf diese Weise die Sanktionspflichten laut Artikel 16 des Voelkerbundsvertrags in den Vordergrund gerueckt. Auch auf diesem Gebiet ist in der bereits)(1) erwaehnten Aeusserung des aussenpolitischen Ausschusses ein Programm der schwedischen Staatsfuehrung aufgestellt worden.

In dieser Programmerklaerung wird unter ausdruecklicher Billigung die Verlautbarung wiedergegeben, die die Aussenminister von sieben Staaten, unter denen sich auch Schwe-)(2) den befand, am 1. Juli 1936 in Genf erlassen haben und in der es u.a. heisst:

"In-dem wir daran erinnern, dass Richtlinien fuer die Anwendung von Artikel 16 im Jahre 1921 angenommen worden sind, erklaeren wir, dass wir uns, solange der Voelkerbundsvertrag in seiner Gesamtheit nur unvollstaendig und nicht folgerichtig angewendet wird, vor

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anlasst schon, diesen Umstand bei der Anwendung dieses Artikels zu beruecksichtigen."

Weiter wird unter Zustimmung des Ausschusses angefuehrt, dass die schwedische Regierung in einem officiellen Schreiben an den Voelkerbund ueber die Anwendung der Grundsaetze der Voelkerbundssatzung vom August 1936 die in der zitierten Verlautbarung zum Ausdruck gelangte hebt danach hervor, "dass die Lage der groesseren und kleineren Maechte in verschiedener Hinsicht wesentlich voneinander abweicht, wenn es sich darum handelt, die Gefahren zu uebernehmen, die im Zusammenhang mit den in Art. 16 vorgeschriebenen Massnahmen stehen. Der Ausschuss haelt es fuer wuenschenswert, dass sich die schwedische Regierung im Einvernehmen mit den Regierungen anderer uns nahestehender Staaten innerhalb des Voelkerbundes fuer eine derartige Auflockerung der Bestimmungen des Artikels 16 einsetzt, wie sie vom Standpunkt der kleineren Staaten im Sinne der Ausfuehrungen des Gutachtens geboten erscheint. Die weitere Behandlung der Frage betreffend die Anwendung der Voelkerbundssatzung und ihre etwaige Revision innerhalb des Voelkerbundes wird der Regierung sicherlich Gelegenheit geben, ihre Einstellung zu diesen Fragen vor dem massgeblichen Organ des Voelkerbunds zur S prache zu bringen.".) (4)

.....

Die Befuerchtungen, die die gegenwaertige Lage bei einem Staat wie Schweden erwecken kann, leiten sich teils aus den J u r i s t i s c h e n Bedenken her, die sich aus der jetzigen Unklarheit ueber den genauen Inhalt der Verpflichtungen ergeben koennen, und teils aus dem p o l i t i s c h e n Bedenken die durch die Maechtegruppierung innerhalb und ausserhalb des Voelkerbundes hervorgerufen werden.) (5)) (6)

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.....

Hiermit bin ich bei der Frage der N e u t r a l i t a e t angelangt. Ihre S ache darf, so scheint es mir im Anschluss an meine letzten Ausfuehrungen nicht so gefuehrt worden,) (7) dass ein Rueckfall in die volle Gleichstellung zwischen Staaten, die die Rechtsordnung verletzen, und solchen, die) (8) sie achten, erfolgt. Es ist eine sehr bemerkenswerte Tatsache, dass die amerikanische Neutralitaetsgesetzgebung, die) (9) jetzt in Kraft ist, nicht in Anwendung gebracht worden ist, obwohl in Ostasien die groessten Kriegsoperationen vor sich gehen, die nach dem Weltkrieg ueberhaupt vorgenommen worden sind.

Als in Schweden der Eintritt in den Voelkerbund diskutiert wurde, stand die Frage im Mittelpunkt, welche Abaenderungen dieser Schritt in unserer alten Neutralitaetspolitik mit sich bringen wuerde. Die Anwendung von Artikel 16, seine militaerischen Sanktionen, seine wirtschaftlichen S ankt-) (10) ionen und das Durchzugsrecht durch unser Gebiet wurden als Abweidungen von der alten Neutralitaet festgestellt. Jetzt ist eine guenstige Gelegenheit gegeben, die Arbeit fuer die nordischen und neutralen Richtlinien fuer einen Voelkerbund wieder aufzunehmen, denen man damals vor unserem Eintritt nicht ganz Gehoer verschaffen konnte, und so in einem wichtigen Punkt zu der alten politischen Richtlinie zurueckzukehren. Ich meine, jetzt wie bei der Reichstagsverhandlung, besonders das Durchzugsrecht. ..... "

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*) Gehalten in der Vereinigung "Laboremus". Auszugsweise wiedergegeben nach amtlich mitgeteilter Uebersetzung. Die leitenden Gesichtspunkte dieser Rede kehren in der R e i c h s t a g s r e d e des schwedischen Aussenministers vom 17.1.1938 (Riksdagens Protokoll, Andra Kammeren, 1938, S. 89 ff.) wieder.

XIX.

1938, 10 January:

Exposé of the Polish Foreign Minister, Beck, before the Foreign Affairs Committee of the Sejm (Extract) *)

. . . .

I take the liberty of repeating briefly that I characterized this transformation as a tottering of the methods which were proposed in the atmosphere of the times immedistaly following the war for regulating the relations of States. The opinion was then that the shock experienced / had radically and irrevocably altered man's ways of ac- / (1) ting and thinking. We, for our part, have always stressed / that we sympathized with the idea of seeking new paths which would save humanity sacrifices and harm where better forms of co-operation might perhaps prevent them. However, independently of the fundamental changes which have occured in the structure of international life, the form in which this new idea was expressed bore in itself from the very beginning the seed of many failures and was bound to cause many reservations.

Already at the time about which I wish to speak, this / process of transformation and these failures assumed dras- / (2) tic forms . . . . /

. . .

You will permit me to repeat and state once more my appreciation of the situation:

1) The crisis of the forms of international life has increased.

2) we can safely affirm that Poland's policy has relatively suffered least from this.

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I now turn again to this crisis: it is first of all connected with the League of Nations, its difficulties and its failures; for even certain undoubted successes achieved by international agreements and put into effect outside the League of Nations mean nothing in its favour. For some considerable time already, during which I have furthermore dealt in the Sejm and the Senate with a series of questions on this subject, I could not help getting the impression that we were faced by two entirely opposed tendencies in Genova. On the one hand, practice and experience have shown irrefutably that the total application of the principles of the Covenant surpassed the real capabilities of the League of Nations. Beside this, it is possible to observe how, as from a contradiction, not only certain theoretical and political passions rise and attempt to place before this poor League of Nations increasingly difficult tasks, but also to notice formal efforts to increase these defects, evident from the League of Nations' measures, -by theoretical clauses only put down on paper. Polish diplomats, who pay attention to the correctness of our State's actions and are worried about the final fate of the Geneva institution, made efforts during the last two years to expose this dangerous contradiction. While considering the questions which arose at the conference table at Geneva, they tried to find for themselves the right way, characterized equally by regard for existing obligations and by a sense of reality and of future possibilities.

On no account do I wish to say by this that the search for better, juster solutions of international conflicts is a hopeless business.

. . .

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We have no intention of taking any initiative ourselves which might increase the present crisis of the League of Nations. But we must always remain conscious of what our obligations are, what we are responsible for, and also of how and on what basis the decisions made in the international institutions came to pass. I am induced to such a public presentation of the affair in the first place by the fact that in some circles of international public opinion a depreciation of these fundamental changes can be observed, as was, for example, recently expressed by Italy's withdrawal and Germany's declaration about the question of the League of Nations, or in the idea prevalent here and there that what is taking place must benefit the League of Nations. I cannot help / getting the impression that some elements would like to / see in the League of Nations primarily a tool directed / against the so-called totalitarian States. It is striking / that these same elements would like to make international life so to speak totalitarian with the aid of the League of Nations. It seems to me that this violent contradiction needs no further comment. I stress instead once again that we respect everyone's right to rule according to their own principles in their country, on condition that they do not wish to transform others, and particularly us, on their pattern. (7)

And another thing in Geneva is dangerous: this concerns more a question of practice than one of principles laid down in writing. As I have already mentioned, difficulties which the League of Nations came up against as soon as new problems arose required -actually quite justifiably- the calling of conferences of a more or less large number of states which were

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interested in the problem or were at least in a position to exercise some influence on its solution. We supported some initiatives of this kind, as for instance the Committee for Non-intervention in the Spanish Civil War, in the firm conviction that at that moment this was the only practical means of lessening the danger of further complications which the Spanish events might have been able to cause. We categorically protest, however, and will also protest in the future against thrusting upon the League of Nations, and with it on all its members, decisions which were formed only by one group of States and outside the League of Nations. I fear that this last circumstance has had an unfavourable effect on the attitude of public opinion to the League of Nations in many countries which had already to a certain extent become used to this kind of international co-operation. . ."

*) Translation (N.B.into German) by Dr.Ellinor von Putkamer according to the text published in the "Monitor Polski, of the 11-1-1938 (No.7).
See also the semi-official statement of the 14-12-1937,Polit. Inf.Pol,"Gazeta Polska" of the 15-12-1937; French translation in the Journal "La Société des Nations" ("The League of Nations") 19th year, Oct-Dec.,1937, p.437 seq.
See: Journal for Foreign Public Law and International Law (Zeitschrift fuer Auslaendisches oeffentliches Recht und Voelkerrecht) Vol. VIII No.1 (1938) page 195, seq.

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1938, 22 Feb.:

Statement of the British Prime Minister, Neville Chamberlain, in the House of Commons: *)

"I have often expressed the view that the party opposite allow themselves to be governed by phrases, the actual meaning of which they never take the trouble to think out. Among those phrases is "collective security." What do they mean by collective security? (HON. MEMBERS: "What do you mean?") I mean by collective security a system under which the collective action of a number of States is assured to prevent aggression, or if aggression is undertaken, to put a stop to it and punish the aggressor. I wonder whether anybody differs from that definition. (HON. MEMBERS: "No!") I am glad that we are agreed so far. Does anybody here believe that the League, as it is constituted today, can afford collective security? (1) (2)

.....

At the last Election it was still possible to hope that the League might afford collective security. I believed it myself. I do not believe it now. I would say more. If I am right, as I am confident I am, in saying that the League as constituted to-day is unable to provide collective security for anybody, then I say we must not try to delude ourselves, and, still more, we must not try to delude small weak nations, into thinking that they will be protected by the League against aggression and acting accordingly, when we know that nothing of the kind can be expected. (3)

The party opposite seem to me to be the worse kind of diehards. They keep on repeating cliches and phrases and tags which once may have had some significance but

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have none to-day. You cannot expect a motor car to win a race if half its cylinders are out of actions. You cannot expect a league constituted originally to perform certain function, on the assumption that if it did not embrace every nation in the world, it embraced practically all the powerful nations of the world - you cannot expect a League which has been given a function corresponding with that State of things, to be able to exercise that same function if nearly all the great Powers have left it. (4)

.....

I say that the power of the League does not depend upon its nominal membership. It depends upon the conviction of its members that it can carry out its functions. At the time of the last Election the conviction that it could not carry out its functions was not universal, even if some suspicion had entered into the minds of some emembers of the League. I say that to-day you will not find anywhere in the League any conviction that collective security can be provided by the League as now constituted. What is the conclusion to be drawn from that? (HON. MEMBERS: "Why do you stay in?") I am staying in because I still have faith that the League may be reconstituted, because I still believe that there is important and valuable work for the League to do. But I doubt very much whether the League will ever do its best work as long as its members are nominally bound to impose sanctions or to use force in support of obligations. ...." (5)

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*) Parl. Deb., H.C., vol. 332, col. 226 sqq.

H1264-0093

XXI.

Amtliches Kommuniqué der Konferenz der Ausserminister von Belgien, Daenemark, Finnland, Luxemburg, Norwegen, Holland und Schweden (Kopenhagen 23. und 24. Juli 1938)

Les ministres des Affaires étrangères de la Belgique, du Danemark, de la Finlande, du Luxembourg, de la Norvège, des Pays-bas et de la Suède, réunis à Copenhague les 23 et 24 juillet 1938, ont procédé à l'examen de la situation internationale. Ils reconnaissent que la situation donne lieu à certaines inquiétudes mais gardent confiance, espérant que les peuples et des hommes d'Etat feront le nécessaire pour trouver une solution pacifique aux graves problèmes actuels.

Les pays représentés à Copenhague sont prêts à collaborer activement à tout effort international de conciliation dans un esprit d'impartialité et d'indépendance vis-à-vis des divers groupes de puissances. Conscients des dangers de la course aux armements, ils sont décidés notamment à soutenir toute initiative tendant à l'élaboration d'une convention relative aux bombardements aériens. (1)

Les ministres sont persuadés qu'il y a lieu pour leur pays de continuer leur collaboration à l'oeuvre de la Société des Nations. Ils constatent que leurs Gouvernements respectifs sont décidés à maintenir une ligne de conduite tracée, considérant le système des sanctions comme ayant acquis dans les conditions actuelles et par suite de la pratique suivie pendant ces dernières années un caractère non obligatoire. Ils estiment que ce caractère de non obligation des sanctions ne vaut pas d'ailleurs pour un groupe particulier d'Etats, mais existe pour tous les membres de la Société des Nations. (2)

Les ministres sont convaincus qu'il est dans l'intérêt de la Société des Nations que soit explicitement constaté ce droit de libre appréciation. C'est dans cet esprit qu'ils se préparent à examiner le rapport que le Comité des vingt-huit a soumis à l'appréciation de l'Assemblée. Ils souhaitent enfin que la Société des Nations intensifie son action dans le domaine de la prévention des conflits et de la coopération internationale. Les ministres ont convenu de maintenir en vigueur les accords signés entre eux pour l'examen des questions d'un intérêt commun.

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Ils se réuniront à Genève lors de la prochaine session

de la Société des Nations.

(Entnommen aus: Temps v. 26.7.1938; dänischer Text: Udenrigspolitiske Meddelelser 4. Aargang Nr. 4-5, S. 122f.)

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XXII.

Note of the British Foreign Office to the Secretary-General of the League of Nations, dated the 13 February 1939:

Foreign Office,

London, February 13, 1939.

Sir,

I am directed by Viscount Halifax to inform you that His Majesty's Government in the United Kingdom of Great Britain and Northern Ireland have had under consideration the fact that under Article 45 (1) and (2) of the General Act for the Pacific Settlement of International Disputes drawn up at Geneva on the 26th September, 1928, the next period of five years for which the Act runs, in the absence of denunciation, commences on the 16th August next.

2) His Majesty's Government in the United Kingdom remain firmly attached to the principle of the pacific settlement of international disputes, and they would be most unwilling to make use of their right to terminate their participation in the General Act as from next August. They recall, however, that in the Memorandum on the proposed accession of His Majesty's Government in the United Kingdom to the General Act, which was issued on the 23rd February, 1931, by the Secretary of State for Foreign Affairs - the late Mr. Arthur Henderson - it was stated as follows: -

> "The initial currency of the General Act is a period of five years from the first accessions. Since these took effect in 1929 the General Act will be binding upon those who now accede to it up to 1934, when it may be either continued in its present form, or revised in the light of experience and of changes in public opinion."

It was thus made clear by His Majesty's Government at the time of their accession that the General Act might require revision in the light of experience.

3) The time has now come for His Majesty's Government to decide whether, and if so under what conditions they are prepared to continue to be bound by the General Act for a further period of five year

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4) So far as concerns the settlement of disputes arising in peacetime, His Majesty's Government are ready to subscribe fully to the General Act.

5) But His Majesty's Government are bound also to bear in mind that the General Act, though aimed at securing the pacific determination of disputes between nations, is by its present terms applicable also in the possible event of disputes arising during war. In particular, they cannot exclude from consideration the changes which have occured in regard to the League of Nations, and the position of its members in relation to their obligations under the Covenant. (1)

6) His Majesty's Government in the United Kingdom have therefore reached the conclusion that in the unhappy event of their finding themselves at war at any time in the future they could not continue to be bound by the Act as regards disputes arising in such conditions.

7) His Majesty's Government would be ready to consider any proposals which might seem likely to secure general acceptance for the revision of the Act so as to bring it into conformity with present conditions.

8) I am therefore directed to notify you that, availing themselves of the provisions of Article 45 (4) and Article 39 of the General Act, His Majesty's Government in the United Kingdom will continue, after the 16th August, 1939, to participate in the General Act for the Pacific Settlement of International Disputes subject to the reservation that, as from that date, the participation of His Majesty's Government in the United Kingdom in the General Act will not, should they unfortunately find themselves involved in hostilities, cover disputes arising out of events occurring during the war. This reservation applies also to the procedure of conciliation.

9) I am to add that the participation of His Majesty's Government in the United Kingdom in the General Act after the 16th August, 1939, will continue, as heretofore, to be subject to the reservations set forth in their instrument of accession.

I am, &c. GEORGE MCUNSEY.

(taken from: Cmd. 5947. Miscellaneous No.2 (1939).

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Exh. No. 32

XXIII

Letter of the French Foreign Minister to the Secretary-General of the League of Nations, dated the 13th Feb. 1939.

Mr. Secretary-General,

I have the honour of bringing to your notice that the government of the French republic, at the moment when the general act of arbitration is about to enter upon a new period of 5 years, in conformity with article 45 of the said act, has taken account of the situation as it stands for it in this respect.

The government of the Republic intends to maintain its adhesion to this act. It must, however, take into account the new situation which results both from the withdrawal of certain States from the League / (1 of Nations and from the interpretation placed by certain members of the League on their obligations resulting from the covenant.

Furthermore, it does not intend to lose sight of the fact that, according to the principle admitted by the conventions of The Hague, belligerent States must, in time of war, all be subject to the same rules.

In view of these considerations and with reference to articles 39, par. 2, and 45, par. 4, of the abovementioned act, I have the honour of addressing the following declaration to you:

"The government of the French republic declares that it adds to the instrument of adhesion to the general act of arbitration handed in its name on the 21st May 1931 the reservation that henceforth the said adhesion will not extend to differences concerning events which may occur during the course of a war in which it is involved."

(from: "Temps" of 5-3-1939)

XXIV.

Letter of the British Foreign Office to the Secretary-General of the League of Nations, dated the 7 September 1939.

(C.L. 141. 1939. V. Annexe)

Translation (N.B. from English into French)

Foreign Office SW I

7 September 1939

Mr Secretary-General,

I have the honor, on Viscount HALIFAX' orders, of bringing to your notice that His Majesty's Government in the United Kingdom of Great Britain and Northern Ireland has considered it necessary to examine the situation created, under the present circumstances, by its acceptance of the Optional Clause of the Statute of the Permanent International Court of Justice. This acceptance had a duration of 10 years dating from ratification, which took place on the 5th February 1930.

2) The conditions under which His Majesty's Government signed the Optional Clause were set forth in a memorandum published at the time (Miscellaneous No.12, 1929) (1), of which a copy is enclosed for reference. Paragraphs 15-22 of this memorandum set forth the considerations by virtue of which His Majesty's Government acquired the conviction, at that time, that it could accept the Optional Clause without formulating any reservation (as it would have had a full right to do) as regards differences which might result from events occuring during the course of a war (1)

(1) This memorandum has not yet reached the Secretariat.

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in which it was involved. These considerations in short, were that the creation of a new international system founded on the Covenant of the League of Nations and on the Pact of Paris had fundamentally modified the whole question of belligerence and of the rights of neutrals. In the only circumstances in which one envisaged that His Majesty's Government could be involved in a war, the other members of the League, far from being in the position of neutrals having the right to trade with our enemy, were obliged, by virtue of Article 16 of the Covenant, to break off all relations with it. This situation had as its result, at the moment when His Majesty's Government signed, that the conditions which could bring about a difference, which the Court was competent to judge, between the United Kingdom as a belligerent and another member of the League as a neutral, would not aarise, seeing that the other members of the League would either fulfil their obligations arising from Article 16 of the Covenant or, if they did not, would have no reason to protest against the measures which His Majesty's Government might take to prevent, for their part, any action incompatible with the said obligations. (2) (3)

3.) Nevertheless, it is now evident that a large number of members of the League no longer consider themselves bound, by virtue of the Covenant to take any measures against an agressor state. At the time of the League Assembly of September 1938, the opinion thus expressed was taken note of (4)

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and it became evident that sanctions against an aggressor, in the terms of the Covenant, could not be considered obligatory. It only remained understood, in a general manner, that the members would consult each other in case of aggression against another member and that this aggression would not be treated with indifference.

4) In the present crisis it has not been recognized as possible to give practical effect to this agreement, to however limited an extent. No measure has been taken in virtue of Articles 16 or 17 of the Covenant nor even in virtue of Article 11, and, before hostilities break out, a certain number of States which are members of the League of Nations have declared their intention of maintaining strict neutrality between the two belligerents. His Majesty's Government formulates no complaint with regard to this state of affairs, although it reserves all its rights in its quality as a member of the League. In any case, the present situation clearly shows that, in the present case, a complete collapse of the Covenant has in fact taken place, that all the machinery intended to maintain peace has became dislocated and that the conditions under which His Majesty's Government accepted the Optional Clause no longer exist. This situation, so fundamentally different from that which existed at the moment when it signed the Optional Clause, had been mentioned as a possibility in Par.22 of the Memorandum of 1929 in which his Majesty's Government declared that it could not conceive that, in case all the machinery intended to maintain

(5)

(6)

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peace collapsed, the only thing that would continue to exist would be the Optional Clause and the obligations it involves for the signatories.

5) As a result, I am charged with notifying to you that His Majesty's Government, convinced that it is firmly defending the principles which inspired the Covenant, will not consider that its acceptance of the Optional Clause applies to differences which may result from events occurring during the course of the present hostilities.

6) I am charged to request you to be kind enough to communicate this notification to the Governments of all the States who accepted the Optional Clause as well as to the Registrar of The Permanent International Court of Justice.

I am (etc.....)

(signed) Alexander CADOGAN.

The Secretary-General,
League of Nations,
GENEVA.

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Memorandum on the Signature by His Majesty's Government in the United Kingdom of the Optional Clause of the Statute of the Permanent Court of International Justice (Excerpt)

Cmd.3452. Miscellaneous No. 12 (1929).)

Belligerent Rights and the Optional Clause.

15) It seems probable, however, that the practical question which underlies the apprehensions referred to above is whether the signature of the Optional Clause would, by exposing the legitimacy of British belligerent action at sea to the decision of an international court, hamper the operations of the British Navy in time of war, and on this point His Majesty's Government desire to explain fully their view of the position created by acceptance of the Covenant, the Pact of Peace, and the Optional Clause. / (1)

16) At the outset of any consideration of this subject it is important to emphasise that the possibility of British naval action at sea being brought before the Permanent Court of International Justice in consequence of our signature of the Optional Clause can only arise if the country which desired to challenge the validity of such action had itself signed the Optional Clause. The only States which can sign the Protocol establishing the Permanent Court, and consequently the only States which can sign the Optional Clause, are the Members of the League and the States mentioned in the annex to the Covenant. The only States mentioned in the Annex who are not now Members of the League

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are the United States, Brazil, Ecuador and The Hejaz.

17) The position of Brazil, which has signed the Optional Clause but is no longer a Member of the League, is peculiar, but for present purposes the question may be discussed on the basis that only another Member of the League could bring our naval action before the Permanent Court under the Optional Clause.

18) It should also be borne in mind that the possibility of our belligerent action in the past being brought before the Permanent Court in consequence of our acceptance of the Optional Clause is excluded by the terms of our Declaration.

19) Disputes as to the exercise of belligerent rights at sea have in the past arisen from the clash of two conflicting rights; the right of the belligerent to make use of his naval strength to interfere with the sea-borne commerce of the enemy, and the right of the neutral to continue his trade irrespective of the existance of a war in which he is not engaged. Both of these rights are, within certain limits, equally recognized by international law, and in the course of the last two hundred years certain principles have emerged whose effect was to define the respective scope of these conflicting rights and to lay down certain rules for regulating the situation which arose from their clash. No one, however, will suggest that the establishment of rules of international law on this subject has reached a stage which eliminates the possibility of disputes between belligerents and neutrals, and unless one is prepared to accept the possibility of the production

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and general acceptance of a code which would provide a satisfactory solution for every question of this sort which might arise in a quite indeterminate future, it is difficult to see how this process could ever eliminate the possibility of serious disputes of this nature. And public opinion in this country is naturally sensitive as regards any action which might be considered as unduly limiting the exercise of British sea power in time of war.

20. But the whole situation described in the preceding paragraph rests, and international law on the subject has been entirely built up, on the assumption that there is nothing illegitimate in the use of war as an instrument of national policy, and, as a necessary corollary, that the position and rights of neutrals are entirely independent of the circumstances of any war which may be in progress. Before the acceptance of the Covenant, the basis of the law of neutrality was that the rights and obligations of neutrals were identical as regards both belligerents, and were entirely independent of the rights and wrongs of the dispute which had led to the war, or the respective position of the belligerents at the bar of world opinion. (2)

21. Now it is precisely this assuption which is no longer valid as regards States which are Members of the League of Nations and parties to the Peace Pact. The effect of those instruments, taken together, is to deprive nations of the right to employ war as an instrument of national policy, and to forbid the States which have signed them to give aid or comfort to an offender. As between such States, (3) (4)

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their territories are to be used for the passage of commerce between him and any other State. This being so, the conditions which might produce a justitiable dispute between this country as a belligerent and another Member of the League as a neutral would not exist; either the other Members of the League would fulfil their obligations under Article 16, in which case we should not require to effect any interference with their commerce, or if they did not, and such interference on our part therefore became necessary, they would have no ground on which to protest against our action, since any protest must be based on a claim to trade with the enemy, which would be inconsistent with their obligations under the Covenant. In other words, as between Members of the League, there can be no neutral rights, because there can be no neutrals. (5)

22. Once this fundamental change in the situation is realised, it will be seen that the ordinary arguments against submitting British naval action to arbitral decision have ceased to be relevant to any discussion of the Optional Clause. Once it is established that in the conditions created by the Covenant and the Pact a Member of the League does not possess any right to carry on commerce with the State with which we are at war, and that we are no longer obliged to rely, in order to stop such commerce, on the old rules governing the relations of belligerent and neutral, it is immaterial to argue that those rules are uncertain and liable to become out of date, or that there is a difference between the Anglo-Saxon and Continental schools of law, or

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there has been in consequence a fundamental change in the whole question of belligerent and neutral rights. The whole policy of His Majesty's present Government (and, it would appear, of any alternative Government) is based upon a determination to comply with their obligations under the Covenant of the League and the Peace Pact. This being so, the situation which we have to onvisage in the event of a war in which we were ongaged is not one in which the rights and dutios of belligerents and neutrals will depend upon the old rules of war and neutrality, but one in which the position of the Members of the Loague will be determined by the Covenant and the Pact. If His Majosty's Government comply with their obligations under those instruments, there are only two conditions in which they could be involved in war: (1) where a State has attacked them in violation of one or both of those instruments,* or (2) if they were engaged in belligerent action, in fulfillment of Article 16 of the Covenant, against a Covenant-breaking State. In either case Article 16 would apply, and so far from the other Members of the League being in the position of neutrals with a right to trade with our onemy which might conflict with our belligerent rights and thus produce a justifiable dispute, they would be bound under that article to sever all relations with him; they could neither trade direct with him nor allow

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*It is still possible, in narrowly restricted circumstances, for a State to go to war in violation of the Pact without necessarily violating the Covenant, and in such a case Article 16 would theoretically not apply. These circumstances seem, however, most unlikely to arise in practice, and the possibility of their doing so will be eliminated if the Covenant, is amended as proposed by the British Delegation at the 1929 Assembly.

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that the Permanent Court has no rules of evidence, or that the majority of its judges will be neutrals and biased against the belligerent. Any such arguments can only be based on the assumption, express or implied, that the Covenant and the Pact will break down in practice. If this assumption is made, it means that the whole machinery for the preservation of peace, so laboriously constructed since 1918, would have broken down; the Peace Pact and the Covenant would have become scraps of paper, but at the same time the one thing which remained standing in the general wreck would be the Optional Clause and our commitments thereunder. This seems to His Majesty's Government an inconceivable situation. They do not believe that it would be possible for the Optional Clause to survive in the general ruin.

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XXV.

Deutsch-sowjetischer Grenz- und Freundschaftsvertrag vom 28. September 1939:

Die Deutsche Reichsregierung und die Regierung der UdSSR betrachten es nach dem Auseinanderfallen des bisherigen Polnischen Staates ausschliesslich als ihre Aufgabe, in diesen Gebieten die Ruhe und Ordnung wiederherzustellen und den dort lebenden Völkerschaften ein ihrer völkischen Eigenart entsprechenden friedliches Dasein zu sichern. Zu diesem Zwecke haben sie sich über folgendes geeignet:

Artikel I.

Die Deutsche Reichsregierung und die Regierung der UdSSR legen als Grenze der beiderseitigen Reichsinteressen im Gebiete des bisherigen Polnischen Staates die Linie fest, die in der anliegenden Karte eingezeichnet ist und in einem ergänzenden Protokoll näher beschrieben werden soll.

Artikel II.

Beide Teile erkennen die in Artikel I festgelegte Grenze als endgültig an und werden jegliche Einmischung dritter Mächte in diese Regelung ablehnen.

Artikel III.

Die erforderliche staatliche Neuregelung übernimmt in den Gebieten westlich der in Artikel I angegebenen Linie die Deutsche Reichsregierung, in den Gebieten östlich dieser Linie die Regierung der UdSSR.

Artikel IV.

Die Deutsche Reichsregierung und die Regierung der UdSSR betrachten die vorstehende Regelung als ein sicheres Fundament für eine fortschreitende Entwicklung freundschaftlichen Beziehungen zwischen ihren Völkern.

Artikel V.

Dieser Vertrag wird ratifiziert und die Ratifikationsurkunden werden sobald wie möglich in Berlin ausgetauscht werden. Der Vertrag tritt mit seiner Unterzeichnung in Kraft.

Ausgefertigt in doppelter Urschrift in deutscher

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und russischer Sprache.

Moskau, den 28. September 1939.

Fuer die Deutsche Reichsregierung

(gez) von Ribbentrop.

In Vollmacht der Regierung der UdSSR

(gez) W.Molotow

(Vgl. Politische Vertraege, eine Sammlung von Urkunden, herausgegeben von V.Bruns, Band III, Zweiter Halbband, Berlin 1942, S.1102).

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XXVI.

Erklaerung der Deutschen Reichsregierung und der Regierung der UdSSR. vom 28. September 1939:

Nachdem die Deutsche Reichsregierung und die Regierung der UdSSR, durch den heute unterzeichneten Vertrag die sich aus dem Zerfall des polnischen Staates ergebenden Fragen endgueltig geregelt und damit ein sicheres Fundament fuer einen dauerhaften Frieden in Osteuropa geschaffen haben, geben sie uebereinstimmend der Auffassung Ausdruck, dass es dem wahren Interesse aller Voelker entsprechen wuerde, dem gegenwaertig zwischen Deutschland einerseits und England und Frankreich andererseits bestehenden Kriegszustand ein Ende zu machen. Die beiden Regierungen werden deshalb ihre gemeinsamen Bemuehungen, gegebenfalls mit anderen befreundeten Maechten, darauf richten, dieses Ziel so bald als moeglich zu erreichen.

Sollten jedoch die Bemuehungen der beiden Regierungen erfolglos bleiben, so wuerde damit die Tatsache festgestellt sein, dass England und Frankreich fuer die Fortsetzung des Krieges verantwortlich sind, wobei im Falle einer Fortdauer des Krieges die Regierungen Deutschlands und der UdSSR sich gegenseitig ueber die erforderlichen Massnahmen konsultieren werden.

Moskau, den 28. September 1939.

Fuer die Deutsche Reichsregierung:

(gez.) v. Ribbentrop.

In Vollmacht der Regierung der UdSSR:

(gez.) W.M.Molotow.

(Vgl.Politische Vertraege, eine Sammlung von Urkunden, herausgegeben von V.Bruns, Band III Zweiter Halbband, Berlin 1942, S.1111.)

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Exhibit No. 37

XXVII.

Noel-Baker in the House of Commons Session of 21 Nov. 1939 : *)

"The idea of an Assembly which could not even mention the great war that was in progress while it was sitting would have made the authors of the Covenant turn in their graves. They would have been utterly revolted by the conception of a neutralised League, which seems to be so generally accepted at the present time."

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*) Parl. Deb., H.C., vol. 353, No. 198, col. 1178

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XXVIII.

Resolutions of the Assembly and of the Council of the League of Nations on the conflict between the League members Finland and the Union of Soviet Socialist Republics:

A.

Resolution of the Assembly dated 14 December 1939:

The Assembly:

I.

Establishing that by the aggression it has committed against Finland, the Union of Soviet Socialist Republics has contravened both its special political agreements with Finland and Article 12 of the League of Nations Covenant and the Pact of Paris: (1)

And that, on the eve of taking action it denounced, without having the right to do so, the treaty of non-aggression concluded in 1932 between itself and Finland which should have remained in force up to the end of 1945:

Solemnly condemns the action of the Union of Soviet Socialist Republics against the Finnish State;

Addresses an urgent appeal to every member of the League to furnish Finland with all the material and humanitarian assistance in their power, and to abstain from any action which might tend to weaken Finland's power of resistance;

Authorizes the Secretary General to offer the help of his technical services for the organization of the assistance to Finland which is contemplated above:

Also authorizes the Secretary General, by virtue of the resolution of the Assembly dated 4 October 1937 to consult non-member States with a view to eventual co-operation.

II.

Seeing that the Union of Soviet Socialist Republics has, in spite of the invitation extended to it on two occasions, refused to appear before the Council and before the Assembly, in order to proceed to an examination

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of its differences with Finland;

That, in thus refusing to acknowledge the mission of the Council and of the Assembly with regard to the execution of article 15 of the Covenant, it has broken one of the League's most essential obligations for guaranteeing peace and the security of nations;

That it made vain attempts to justify its refusal by alleging that it had established relations with an alleged government which is neither de jure nor de facto the government recognized by the Finnish people in accordance with the free play of their institutions;

That the Union of Soviet Socialist Republics has not only rendered itself guilty of violating one of its obligations resulting from the Covenant, but has thereby placed itself outside the Covenant;

That the Council is competent, in accordance with the terms of article 16 of the Covenant, to draw the consequences justified by this situation:(2)

Recommends that the Council lay down a ruling on the question.

B.

Resolution of the Council dated 14 December 1939:

The Council,

Having taken note of the resolution adopted by the Assembly on 14 December 1939 with regard to the appeal made by the Finnish government;

1. Associates itself with the condemnation by the Assembly of the action taken by the Union of Soviet Socialist Republics against the Finnish State;

2. For the reasons enounced in the resolution of the Assembly, in view of article 16, paragraph 4, of the Pact,

Establishes that, by its action, the Union of Soviet Socialist Republics has cut itself off from the League of Nations. The result is that it is no longer part of the League of Nations.(3)

(Société des Nations. Actes de l'Assemblée 1939, pages 24 to 36. Journal officiel 1939, pages 506, 508).

H1264-0115

SWISS FEDERAL COUNCIL:

REPORT TO THE FEDERAL ASSEMBLY ON THE 30 JANUARY 1940 *)

..... It is to be welcomed that the Finnish people have gained the united sympathy of the assembly in their heroic struggle for their independence, and one can also understand that their attack has incured a sanction that can perhaps be regarded as the most serious for a member of the community of nations. By rising against the violation of law, the League of Nations has adopted an attitude which is in agreement with the great principles on which its creation is based. The attack has been branded andthrough this justice has been satisfied."

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*) - See Bundesblatt 1940, Volume I, No 5, page 148.

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XXX

1940, 10 April. Butler, Under Secretary of State, in the House of Commans: *)

"But the hon. Members will be aware that this treaty does not contain any provision for the procedure to be followed or the action to be taken in the event of its violation by one of the signatories."

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*) Parliamentary Debates, House of Commons, vol. 359, col. 546.

1941, 16 January:

Stimson, Secretary of War, before the House Committee on Foreign Affairs regarding the proposal of the Lend-Lease Bill: *)

"even under ... international law as it stood before these hostilities in Europe began we would be rightfully authorized to act with regard to what it has been proposed to do in the defense or in the assistance of Great Britain. That is a thing which has not been understood, because the original fountain of the change has been so comparatively recent. (1)

This country was one of the authors of one of the greatest changes in international law that has ever taken place when it was in 1926 and 1927 and 1928 the initiator of what has been called the Pact of Paris, or the Kellogg-Briand Pact. Now, it has not been recognized, even by us, by these Houses of Congress here that were the parents of it, what a vital change was made in the system of international law by that action. However, the international lawyers all over the rest of the world and in this country have recognized this important change, and I want to bring before this committee what they have found. (2)

.....

Now, when these troubles began to arise, when these lawless nations thereafter began to make attacks upon the fabric of international law . . . the Association of International Law . . . met in 1934 to consider what the effect of such an attack as Japan had made upon China would be, or as Mr. HITLER was even then threatening, on Austria.. . . . I might say that the membership of (3)

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that association is composed of the most distinguished international lawyers from all over the world; Americans, British, Frenchmen, Germans, Scandinavians, Italians, Japanese - all of them. And they considered what the effect would be of an attack in violation of the Kellogg Pact by one signatory upon another, and what effect it would have upon the rights and redresses of the other members of the great family of nations which had entered that treaty under international law. And the conclusions which they reached are the most authoritative statement of international law on that subject which, so far as I know, has ever been published. And this is what they said, and I would like to have it on this record very carefully so that when our friends say that to help Great Britain at this time would be an act of war, I would like them to know what these great scholars and lawyers have said it would be under the Kellogg Pact." (4)

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*) (Hearings before the House Committee on Foreign Affairs, 77th Cong., 1st sess., on H.Res. 1776 regarding the Lend-Lease Bill, pp. 103-105.)

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C.

DOCUMENT

AS TO

HITLER'S CONSTITUIONAL POSITION.

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Beschluss des Grossdeutschen Reichstags

vom 26. April 1942.

Der Grossdeutsche Reichstag hat in seiner Sitzung vom 26. April 1942, auf Vorschlag des Praesidenten des Reichstags, die vom Fuehrer in seiner Rede in Anspruch genommenen Rechte einmuetig durch nachfolgenden Beschluss bestaetigt:

Es kann keinem Zweifel unterliegen, dass der Fuehrer in der gegenwaertigen Zeit des Krieges, in der das deutsche Volk in einem Kampf um Sein oder Nichtsein steht, das von ihm in Anspruch genommene Recht besitzen muss, alles zu tun, was zur Erringung des Sieges dient oder dazu beitraegt. Der Fuehrer muss daher - ohne an bestehende Rechtsvorschriften gebunden zu sein - in seiner Eigenschaft als Fuehrer der Nation, als Oberster Befehlshaber der Wehrmacht, als Regierungschef und oberster Inhaber der vollziehenden Gewalt, als oberster Gerichtsherr und als Fuehrer der Partei jederzeit in der Lage sein, noetigenfalls jeden Deutschen - sei er einfacher Soldat oder Offizier, niedriger oder hoher Beamter oder Richter, leitender oder dienender Funktionaer der Partei, Arbeiter oder Angestellter- mit allen ihm geeignet erscheinenden Mitteln zur Erfuellung seiner Pflichten anzuhalten und bei Verletzung dieser Pflichten nach gewissenhafter Pruefung

ohne Rücksicht auf sogenannte wohlerworbene Rechts mit der ihm gebuehrenden Suehne zu belgen, ihm im besonderen ohne Einleitung vorgeschriebener Verfahren aus seinem Amte, aus seinem Rang und seiner Stellung zu entfernen.

Im Auftrage des Fuehrers wird dieser Beschluss hiermit verkuendet.

Berlin, den 26. April 1942.

D e r R e i c h s m i n i s t e r u n d
C h e f d e r R e i c h s k a n z l e i

Dr. Lammers

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EXTRACTS FROM VARIOUS SCIENTIFIC WORKS

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Exhibit No. 43

1921.

I.

Scott, James Brown in:

House, Edvard Mandell and Seymour,

Charles, What really happened at Paris.

The Story of the Peace Conference 1918-1919.

By American Delegates. (New York 1921)*)

"... the action contemplated by the treaty was ... political not criminal" (1)

.....

"Terms are used in Art. 227 (scil. of the Treaty of Versailles) without attempting to define them. What is morality? What is international morality? What is an offence against international morality? And what is the supreme offence against this King, whatever it may be?" (2)

.....

"I am bold enough to say that the American Commission rendered a service to the world at large in standing as a rock against the trial of the Kaiser for a legal offence, and that Holland has made the world its debtor by refusing to surrender the Kaiser for the commission of an offence admittedly political ...

One shudders to think what might have happened if the British and French commissioners had had their way, for they were two, who really seemed set upon getting the Kaiser" (3, (4

.....

"President Wilson regarded the trial of the Kaiser for a criminal offence as entirely out of place and as unjustifiable and he refused to be a party to it." (5)

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*) (p. 238, 239, 245 sq., 478)

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Exhibit No. 44

II.

BRIERLY, J.L., Some Implications of the Pact of Paris. *)

(1) .....

(2) .....

(3) One of the commonest criticisms of the Pact is that, although the parties to it have renounced war as an instrument of their national policies, they have provided in it no means of distinguishing between the war which it forbids and the war undertaken in self-defence which it permits, and that indeed there stands as one of the accepted bases upon which the Pact is made Mr.Kollogg's notorious declaration that "every nation is free at all times and regardless of treaty provisions to defend its territory from attack or invasion and i t a l o n e is c o m p e t e n t t o d e c i d e w h e t h e r c i r c u m - s t a n c e s r e q u i r e r e c o u r s e to w a r in s e l f - d e f e n c e". But in fact, as Professor Shotwell has pointed out, 1) the Pact, in Article 2, "defines aggression and defence without a definition". It is inconceivable that Mr. Kollogg menat to lay down that a state is competent to declare its recourse to war to be defensive in defiance of patent facts; and whether or not a state has been willing to seek a settlement by pacific means must necessarily be a fact patent to all. The point on which criticism has been concentrated concerns solely the interpretation of Article 1, but "if international disputes of whatever nature or of whatever origin they may be are settled by pacific means, then no possible point in the interpretation of Article 1 could ever arise" 2).

(1) (2) (3)

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*) THE BRITISH YEAR BOOK OF INTERNATIONAL LAW, 1929, p. 208-210.

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(4) The so-called British "Monroe" doctrine, asserted by Sir Auston Chamberlain in his Note of May 19, 1928, would go far to stultify our participation in the Pact if Article 1 stood alone: "There are certain regions of the world the welfare and integrity of which constitute a special and vital interest for our peace and safety. His Majesty's Government have been at pains to make it clear in the past that interference with these regions cannot be suffered. Their protection against attack is to the British Empire a measure of self-defence. It must be clearly understood that his Majesty's Government in Great Britain accept the new treaty upon the distinct understanding that it does not prejudice their freedom of action in this respect." But it is not a fair paraphrase of this declaration to say simply that we claim "freedom of action", meaning by that a general freedom from the obligations of the Pact, in the "certain regions" referred to. The claim is qualified; we claim "freedom of action i n t h i s r e s p e c t", and the context shows that this means merely that we claim to treat an "attack" on these regions as an attack on ourselves: in other words, we claim to regard the regions referred to, though not part of the British Empire, as if they were part of it for the purpose of defence. If that is what the declaration means, then, like Mr. Kellogg's doctrine of self-defence, it is only vague and dangerous so long as we fix our attention on Article 1. No occasion for its operation can arise unless Article 2 has first been violated, and, as we have seen, all the world must know when that has occurred. Action under the doctrine would almost certainly be action to e n f o r c e the Pact.

(5) The Pact has been criticized for referring vaguely

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to"pacific means" of settlement, and doing nothing to create an organization for pacific settlement. It would have been superfluous to do so, for in this respect the Pact has been "implemented in advance".) (8)

3) Such a criticism illustrates the vice of regarding the Pact without reference to the envirenment in which it must operate.

(6) The Pact contains no sanctions. Beyond the provision in the preamble "that any signatory Power which shall hereafter seek to promote its national interests by resort to war should be denied the benefits furnished by this Treaty", it says nothing of what is to happen in the event of its terms being violated. But it is inconceivable that nothing should happen. If a state does an act which constitutes a breach of its treaty obligations to another, the latter does not necessarily go to war to enforce its treaty right. But it cannot be indifferent. 4) So in the event of the Pact being broken by a state resorting to war as an instrument of its national policy - and we know from Article 2 that that means without having sought a settlement by pacific means - it is inconceivable that another state, being a party to the Pact, should declare itself neutral betwen the injuring and the injured state. Neutrality in the traditional sense, except perhaps in the unlikely event of both belligerents having violated the treaty, would only be conceivable on the assumption that the state violating the treaty could not be identified, and the immense importance of Article 2 is that for practical purposes it rules out this contingency. (9) (10) (11) (12)

Historically, as is well known, the modern law of neutrality was born of the difficulty, reluctantly accepted since the eighteenth contury as insuperable, of distinguishing between the "just" and the "unjust" bel-

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ligerent. That difficulty would still be insuperable if its solution depended on an instantaneous appraisement of t h e m e r i t s of a dispute, which may be infinitely complicated. It disappears when states are under obligation never to seek the solution of any dispute, w h a t e v e r t h e m e r i t s m a y b e , "except by pacific means". (13)

(7) For Great Britain the most immediate significance of the new outlook on the whole institution of neutrality which the Pact seems to make inevitable is its bearing on the problem of the "freedom of the seas". (14)

Obviously a naval Power which should seek the settlement of a dispute in breach of its undertaking - that is to say, otherwise than by pacific means - must not expect to exercise the traditional, or indeed a n y, belligerant rights at sea against other Powers whose treaty rights it is itself violating, and an authoritative statement on behalf of Great Britain that we accept this consequence of the Pact might clear the air. Such a declaration would cost us nothing, for it would relate to a hypothetical event which we at least know cannot occur, s i n c e G r e a t B r i t a i w i l l n o t v i o l a t e t h e P a c t. But it is an equally clear implication of the Pact that, if we or any other state should be involved in war by a breach of the Pact on the part of the other belligerent, there can be no neutral rights as against the innocent belligerent. (15)
That the Pact has supplied the key to the vexed problem of the "freedeom of the seas" is already recognized by many of those who have given real thought to the matter. 5) The popular recognition, which is probably a condition of any conventional settlement of the question, is probably only a matter of time.

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1) War as an Instrument of National Policy, p. 212.

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2) Miller. u.s. (scil. The Peace Pact of Paris), p. 126.

3) Miller, u.s., p. 137.

4) This is admitted by Senator Borah: "Of course the Government of the United States must reserve the right to decide, in the first place, whether or not the treaty has been violated, and, second, what coercive measures it feels obliged to take. But it is quite inconceivable that this country would stand idly by in case of a grave breach of a multilatoral treaty to)(16 which it is a party... OOf course, in such a crisis we would consult with) the other signatories and take their judgment into account. But we should not bind ourselves in advance to accept their decision.... The effect of the Kellogg proposal is a solemn pledge to let all this peace machinery (sc. the World Court, the League, Locarno) work." Interview in New York Times, March 25, 1928, quoted by Shetwell, u.s., p. 218.

5) Cf., o.g., Miller, u.s., p. 133; Shetwell, u.s., ch. XXI; the Round Table for March, 1928, p. 244; Lord Cecil and W. Arnold-Forster in the Journal of the Royal Institute of International Affairs for March 1928, p. 99.

III

C.G. Fenwick:

"The Implication of Consultation in the Pact of Paris")

. . . . . .

It is not necessary to take exception too minutely to certain statements of the Secretary of State which it is believed there would be difficulty in demonstrating. His interpretation of the "right of self-defense" which forms the primary limitation upon the obligations of the treaty is altogether too simple. For if there be one problem which international law has as yet failed to solve it is the scope of the right of self-defense. Its limits are very far from being "clearly defined as the Secretary suggests; or rather, if the precedents by countless precedents of international relations in the past be taken as a guide to its interpretation, self-defense may well be extended to include the anticipation of attack, or the removal of an international nuisance, or the defense of the person and property of citizens in foreign countries. The senate committee in its report attending, although not incorporated into, the resolution approving ratification clearly had in mind a wider meaning of self-defense than mere resistance to invasion of territory. (1)

Moreover, the suggestion that, with the provisions of the Covenant of the League of Nations already in existence, the Kellogg-Briand Pact represents a "more sweeping step" in the direction of restricting war and that the American Government in its note of January 7 was appealing to "a new common sentiment" is somewhat naive. Article 10 of the Covenant had gone at least as far as Mr. Stimson's note of January 7. . . . . (2)

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*) A.J., vol. 26, 1932, p. 788-789.

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- IV -

JESSUP, PHILIP C., THE BIRTH, DEATH AND REINCARNATION OF NEUTRALITY.*)

In his address before the Council on Foreign Relations in New York City on August 8, the Secretary of State suggested that old notions of neutrality have of necessity been changed by the existence of the Briand - Kellogg Pact. In denouncing as law-breakers the parties who resort to war in violation of the treaty, Mr. Stimson declared, "we have made obsolete many legal precedents and have given the legal profession the task of reexamining many of its codes and treaties."

This is not the first requiem for the late but not lamented Law of War and his vacillating sister Law of Neutrality. Its place, however, in the Secretary's well-considered and highly gratifying declaration of the policy of the United States, forces the international lawyer to decide whether he will classify himself as an undertaker (or, in this modern world, a mortician), a physician, or a metaphysician. To say that the status and law of neutrality have passed beyond, or that we have passed beyond them in our modern world organization, requires first a nice appreciation of what that status and law were when they lived upon this planet. Something, no doubt, is dead and buried, but we must avoid a case of mistaken identity lest in some possible future struggle we be faced with lawsuits for violating that law of neutrality which we have in the past so gallantly championed. To satisfy the more ardent advocates of the hypothesis that the maiden is dead, let us assume an

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*) A.J., vol. 26 (1932), p. 789-793.

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exhumation and post mortem.

.....

In 1920, the Council of the League declared that "The idea of neutrality of members of the League of Nations is not compatible with the other principle that all the members of the League will have to act in common to cause their covenants to be respected." (1) But Germany, Austria, Czechoslovakia, Italy, Jugoslavia and Lithuania, all League members, have concluded treaties by which they agree to remain "neutral" in certain circumstances. It is clear that neutrality may peep in through the famous "gap" in the Covenant and that the lack of a power to define a covenant breaker leaves it open to member states legally to hold aloof from a conflict. What, in such cases, is to be the status of their merchantmen upon the seas; what their duties as to the exercise of belligerent acts within their territorial limits? Add the Briand - Kellogg Pact; a violator is "denied the benefits furnished by this treaty," but is a stranger to the conflict denied the benefits and the obligations of neutrality?

.....

Thought and speech and written word, may indded have changed materially since Geneva became the international hub, but international law has not kept pace. The Hague conventions on the conduct of war and on neutrality are still in force; the last conference of American States (2) at Havana drew up an elaborate convention on maritime neutrality which the United States ratified only a few months ago; members of the League have been making "neutrality treaties". The writer, espousing the rôle of physician, warmly hopes the ancient law will be changed by the express agreement of the nations. He would gladly rally the support of metaphysics and alchemy to change

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the base nature of neutrality for selfish profit into partiality for the peace and happiness of mankind. But if the Law of Neutrality is indeed already dead, that fickle lady may well exclaim "O death, where is thy sting? O grave, where is thy victory?"

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Exhibit No. 47

V.

Neutrality, Its History, Economics and Law:
Vol. IV, Today and Tomorrow (Jessup,
1936), pp. 121-123.

"... among themselves, the members of the League by their particular treaty known as the Covenant, have secured for themselves a legal defense against a fellow member who might protest at the partiality shown through the imposition of sancitons. That defense is not available to a non-member state such as the United States in case we should discriminate against one belligerent. The Pact of Paris contains no legal excuse equivalent to that found in Article 16 of the Covenant. The International Law Association, meeting in Budapest in 1934, agreed upon certain "Articles of Interpretation" of the Pact of Paris. These articles suggest that a state which resorts to war in violation of the Pact can not require from another signatory the observance toward it of the usual obligations, including those of neutrality, prescribed by international law. These suggestions merit study, but they have no legislative force and have not yet been adopted by the governments concerned. ... (1) (2)
The League members may assert in cases where Article 16 is applied, as in the present Italo-Ethiopian war, that they are neither belligerents nor neutrals; if the United States should join in similar discriminations against Italy, it would be forced to take an entirely different and isolated position. It would have to rely on a right to resort to reprisals against Italy for what we considered a violation of a treaty with us, namely, the Pact of Paris. These measures might be what international lawyers call "measures short of war", but they would not be neutrality. The legal relations of neutrals being still unchanged for states not members of the (3)

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League, it remains a major question of policy for the government of the United States to decide whether it will take sides or whether it will maintain neutrality which is still a living institution." (4)

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VI

FISCHER WILLIAMS, SIR JOHN, **Sanctions** under the Covenant,*)

Whatever may be the outcome of the action taken under the auspices of the League in connection with the Italo-Ethiopian conflict, the importance of that action as a fact in the history of international relations will in no competent quarter be disputed. This is the first time in human history that a general attempt has been made by a large number of states great and small, united in a society, to enforce obedience to an international obligation accepted by another state, by the use of measures which that other state has already by treaty agreed to in the event of the violation of the obligation. (1)

.....

The issue in the Italo-Ethiopian case, it is hardly necessary to remind a reader, is different from that which arises when it is proposed to take steps to restrain a violation of international law, such as a breach of a treaty, when no specific measures have been prescribed in advance or assented to beforehand by the violator. We are still far from having any recognized procedure of "Sanctions" for treaty violations generally. Indeed, it is manifest that violations of treaties differ widely in gravity and cannot all be dealt with by similar action. If all breaches of treaties are to be sanctioned, we must have the equivalent of an international legislature - an international organ, that is, with power to revise treaties - or at the very least a tribunal armed with some doctrine analogous to that of "public policy" in English law and permitting unwise treaties to be declared void.

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*)THE BRITISH YEAR BOOK OF INTERNATIONAL LAW, 1936, pp. 130 et Seq.

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Article 16 is usually described as the "Sanctions" article, but it is to be observed that neither the word "sanction" nor any word such as "penalty" or "punishment" occurs either in the article itself or elsewhere in the Covenant.

.....

For the Covenant is a contract, not a legislative measure taken by a sovereign authority; it would have been inappropriate in such an instrument to follow the arrangement which an old commentator tells us us the proper construction of law (legis sunt tres partes, pro-oemium, capita, sanctio), and insert a third division with "Sanctions" for its title.

Nor is this a mere matter of arrangement and style. The essential purpose of the first three paragraphs of Article 16 is to support, sancire, the qualified prohibition of a resort to war which the earlier articles of the Covenant contain, not by the infliction of a punishment for a completed contravention, and still less by so-called "remuneratory sanction"), but by the prevention in any particular case of the success of the action prohibited.

.....

The prevention which is an element of, and perhaps the main justification for, punishment in municipal law, is the prevention of the similar act in the future. This latter element is not absent from the Covenant, and indeed the successful prevention of the immediate act will tend powerfully to discourage attempts at similar acts, but Article 16 prescribes in terms no punishment for an act of a resort to war, such as municipal law provides for a criminal offence,, when once that act has been done and

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carried through. If such a punishment were to be decided upon by Members of the League, they would be developing rather than executing the Covenant. (3)

.....

It has become usual to speak of aggressive war as an "international crime" - a form of speech resulting from the justified sentiment that in modern conditions a resort to war is an outrage against humanity when it is not the mere acceptance of a condition forced upon a state by active aggression. But there is a danger that the word "crime" may lead those who use it to unsound conclusions. International law does not distinguish between actions by states that are wrongful in relation to the whole of international society and therefore analogous to crimes, and actions that violate only the rights of individual members of society. Crime is a concept of municipal law and is admitted into international law only as a qualification of certain acts by individuals, such as piracy; this admission, indeed, is in the nature of an exceptional provision or even an anomaly if the classical doctrine that international law is concerned only with the actions of states is to be rigidly maintained. "Crime" even in municipal law is, as a general rule, applicable only to the actions of natural persons; the composite person, the body corporate, cannot be possessed of that guilty mind which is still in general an essential element of crime.*) That "general will", of which guilt or innocence might properly be predicated, is the creation of the philosopher or the

but not of the lawyer, Burke spoke for civilized humanity when he told the House of Commons that "You cannot indict a nation"; we do not now

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*)See, however, Dr. Stallybrass in LAW QUARTERLY REVIEW, Vol. LII, p. 60.

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admit that the total destruction of the Amalekites can have been the command of a righteous God. We can conceive - learned and humane men have done so - that it may be just to amend the law by making punishable the conduct of individuals who in places of authority have been responsible for the entry of their nation on a war that is illegal, but international law does not at present admit - and it is devoutly to be hoped that it never will admit - the idea of the punishment of a nation. Collective penal responsibility for misdoing is a tenet of primitive law for which international law, even if it be a young law, has no place.

.....

To pass now from questions of interpretation to a broader and more general consideration, we may glance briefly at the relations of Article 16 to the doctrine of neutrality. (4)

It may be a matter of dispute how far the existing international system to which all states belong deserves to be called a "Society", but there can be no doubt that the League of Nations is entitled to take the name which the French text of the Covenant gives it - "Société des Nations". And the members of a society, a société, however loose its ties may be, cannot properly be wholly indifferent in a quarrel which arises out of, and indeed is a violation by one member of one of the chief rules in the constitution of the society. The impropriety of such indifference, which indifference is of the essence of the conduct which international lawyers call "neutrality", would be manifest even if the Covenant, like the Pact of Paris, were wholly silent on the point, but where, as in the Covenant, there are express provisions for action by the Members of the League against one of their number who

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is a belligerent in violation of his contractual agreement, it is obvious that the rule of neutrality has no force to limit the execution of those provisions. Mr. Eden on October 23, 1935, declared the view of the British Government in the United Kingdom:*) "They did not consider that any covenant-breaking state had any legal right to require observance by other Members of the League of any of the laws of neutrality."

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*) Report in THE TIMES newspaper, October 24, 1935.

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VII

Mc NAIR, ARNOLD D., Collective Security.*)

. . . . . .

War itself was no illegality. Its outbreak might sometimes involve the breach of a treaty or some other international wrong, but it more frequently took rise in circumstances not falling within the sphere regulated by law. It was extra-legal rather than illegal. Whether or not the initiation of a war was a breach of law, the rules which regulated it, once it had broken out, were the same for both or all parties. And, what is more germane to my argument, the rules which governed the attitude of states not participating in a war towards the belligerents - the law of neutrality - were the same, regardless of the rights and wrongs of the war. A rigid impartiality in their conduct towards the belligerents was required by the law.

THE PRESENT ATTITUDE

All this changed some years ago - at any rate for the greater part of the world. Most international lawyers have realized that change for some time and have been expounding it, but the majority of laymen had not grasped the change until quite recently, and many of them are reluctant to admit the change even now. Let me mention three facts before I attempt to trace the development which has

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*) THE BRITISH YEAR BOOK OF INTERNATIONAL LAW, 1936, pp. 150 seq.

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culminated in this change. Firstly, on October 9, 1935, war having broken out between two states, Italy and Abyssinia, fifty governments, including our own, met in conference and put it on record that in their opinion Italy had "resorted to war in disregard of its covenants under Article 12 of the Covenant of the League". (1)

The second fact is that to-day fifty governments are engaged in a series of measures, directed to handicap one of two belligerents in its contest with its adversary and eventually to make it impossible for it to continue the contest.

. . . . . .

The third fact is that our government, which has always been foremost in pursuing a policy of strict impartiality in wars to which it is not a party, has recently passed a series of Orders in Council, making it a penal offence for persons in the United Kingdom to carry on with one belligerent certain trades which in previous wars they have always been free to maintain with either or both belligerents so far as the law of this country is concerned.

. . . . . .

The first feature is that it is an unheard of thing that fifty non-belligerents should meet and expressly concur in singling out one of two belligerents for condemnation as a treaty-breaker and an aggressor. The second is that most, if not all, of the measures now in force in the name of sanctions would twenty-five years ago have been serious breaches of the law of neutrality, affording to the victim of them good ground for reprisals or more serious action.

. . . . . .

The distinctive characteristics of this Pact and its

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principal differences from the Covenant may be summarized as follows:

(a) .....

(b) .....

(c) it is a reasonable view, though I cannot assert it to be an established opinion, that a breach of the Pact is a legal wrong not merely against the victim of the resort to armed force but also against the other signatories of the Pact;

(d) it contains within it no provision for collective sanctions, thus avoiding one of the main obstacles preventing the ratification of the Covenant by the United States of America; but a breach of it can be met by its signatories, alone or collectively, by the measures *) available for the prevention or redress of the breach of any other treaty, if they choose to take this course; .....

.....

. . . resort to armed force for the settlement of an international dispute is an illegal act, and, I submit, that illegal act is the commission of an international wrong (breach of treaty) against every state in the

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*) What these measures may be is a highly controversial matter: see Lauterpacht in TRANSACTIONS OF GROTIUS SOCIETY, Vol. XX (1935), pp. 178-202. It is worth noting that Mr. Eden (as Minister for League of Nations Affairs) speaking in the House of Commons of a breach, not of the Kellogg-Briand Pact, but of the Covenant, said: "We do not consider that any Covenant-breaking State has any legal right to require the observance by other members of the League of any of the laws of neutrality." HANSARD (Commons), Vol. 305, p. 218 (October 23, 1935).

world (with unimportant exceptions such as Thibet) and not merely upon the victim of the use of force. That is the big new factor added by the Kellogg-Briand Pact. It is that which might, and, I think, would, justify a signatory of the Pact in conducting itself towards an aggressor in a manner which before the Pact would have amounted to unneutral conduct.

. . . . . .

I have touched on only one aspect of the collective system - the collectivization of force. Equally important is the collective and peaceful revision of treaties and other international conditions whose continuance is a reasonable cause of friction.

. . . . . .

I merely remind my audience that a system which collectivizes the use of force and provides no machinery for the collective revision of the status quo is certain to fail, as has been cogently shown by Sir John Fischer Williams in his short book entitled INTERNATIONAL CHANGE AND INTERNATIONAL PEACE. The direct and positive use of collective force for the revision of the status quo is in my opinion unthinkable. But it is worth considering whether as a first step consent to a revision may not be induced, indirectly and negatively, by making it clear that a state which obstinately declines to co-operate in a revision pronounced after due investigation to be essential to the general welfare cannot rely upon the use of collective force in support of an untenable claim.

. . . . . .

But it is too much to expect that, when there is a clear breach of the Kellogg-Brian Pact and in consequence a breach of a treaty with that country, the

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American Government, which with France was primarily responsible for the Pact, should reply to the breach of treaty by departing from the traditional law of neutrality and preventing its citizens from frustrating the efforts of its fellow signatories of that Pact by trading with a proclaimed agressor ? (3)

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Exhibit No. 50

VIII.

B O R C H A R D , Edwin, and L A G E , William Potter, Neutrality for the United States. *)

"The vague and expansive terms of the British prerogative cover any part of the world in which Britain has "a special and vital interest". No such broad claim to the right to make war had ever before been recognized."

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*) New Haven 1937, p. 293.

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Exhibit No. 51

IX.

KUHN, ARTHUR K., OBSERVATIONS OF FOREIGN GOVERNMENTS UPON SECRETARY HULL'S PRINCIPLES OF ENDURING PEACE. *)

The statement issued on July 16, 1937, by Secretary Cordell Hull, setting forth the position of the United States "in regard to international problems and situations with respect to which this country feels deep concern" . . . . was communicated to all foreign governments with the request for an expression of opinion upon the principles enunciated . . . .

One may begin profitably with the memorandum of the Portuguese Government which seems to have been carefully prepared and is the most lengthy and detailed of all. A mild reproof is voiced against the attitude of the great nations, "on the one hand to consider themselves immune and on the other hand, to maintain themselves alien to effective cooperation, truly useful in the international field." The memorandum warns against the "abstract and generalizing tendency of jurists"; and cites as causes for failure the insufficient study of the causes of world unrest and the desire to find a single formula for the solution of international problems which shall be applicable urbi et orbi. The memorandum continues:

(1) (2) (3) (4)

> On general grounds, it also seems that no objection can be raised against the assertions, advices, or wishes as a whole of the Secretary of State; everyone desires peace, everyone proclaims the sanctity of treaties and the faithful compliance therewith, everyone desires that there be less difficulties in international trade, and everyone wishes to have the burden of armaments removed or lightened. Difficulties begin only when it is sought to pass from the field of intentions into that of action, or, more concretely, what is to be done so that the events-

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*) A. J., vol. 32 (1938), p. 101 - 106

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In the development of which it is very difficult to establish individual or national responsibilitios - will not contradict the good intentions.

. . . . .

The Union of South Africa replied by a remarkable statement on the part of its Prime Minister, which approved of the principles so far as the Union is concorned, "under present circumstances." The statement then continued as follows:

> . . . I cannot help feeling that if the Union had been in the position of a State laboring under wrongs confirmed or porpotuated by agreement at the point of the bayonet, such agreement could have little claim to any degree of sanctity; and certainly to none when the agreement had been obtained in a manner violating the established usage of war, or contrary to the dictatos of international consciences. (5)

While the statement in couched in somewhat cryptic terms, it can scarcely be road in any other sense than that the Prime Minister calls for a rovision of the peace treaties and that such revision could well be insisted upon by any state "wronged", prior to its approval of the principle of the sanctity of treaties. (5a) A statement of this nature would not be expected from one of the British Dominions which had taken a most active part in the war. It is not without great significance from the point of view of British imperial politics. Curiously enough, an echo, much wilder in tone, is found in the reply of Canada. While laudatory of the statement of Secretary Hull, the Canadian note draws the conclusion that emphasis should be laid "upon the task of studying immediately wherein all may try by agreement to modify the barriors and rigidities, both economic and political, which may be claimed to deny to peoples or nations equality of opportunity or treatment; for naturally, it is by such wise anticipations that revolutionary and catastrophic events are to be fore- (6)

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stalled."

. . . . . .

In drawing conclusions from the observations taken as a whole, three points may be emphasized. First, that there was a manifest solidarity of the [illegible] nations of the Western Hemisphere in specific acceptance of the principles. Second, that the problem of intervention in international law has become complicated by the fact that the respective dominant political parties of certain countries assume to extend their sphere of action beyond the territory of their own state, thus engendering a conflict of ideologies without being guilty of intervention in the hitherto accepted sense. Third, that too much reliance must not be placed upon the acceptance of general principles and that the actual and factual elements of international differences must be explored to their foundations if any real contribution is to be made to the maintenance of international peace. (7) (8)

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Exhibit No 52

- X -

Brown, Philip M.:

International Lawlessness. *)

Sovereignty was the corner-stone of international law; it is now the stumbling-block. Grotius and his predecessors attempted cautiously to define and delimit the rights of sovereigns in international intercourse. They also ventured to indicate the obligations of sovereigns towards each other. The rights of aliens were subordinate to the rights and prerogatives of their own sovereigns. No matter how seriously they might be injured in their interests in other lands, they had no valid international claims unless and until their sovereign saw fit to assert such claims as his very own. This archaic doctrine has persisted to the present day except for a few lone voices appealing for a more liberal and a more democratic interpretation of the law of nations as being the law of peoples rather than of sovereigns. There can be no denying of the melancholy fact that sovereignty is stronger than ever. It is so strong that not a few nations are demanding a freedom from all restraints that amounts to sheer lawlessness. (1) (2)

The most glaring evidence of this lawlessness is the "undeclared war" whereby sovereign states intent on their own selfish ends are unembarrassed by the constraints of the laws of belligerency and neutrality. They can go as far as they please or recede when necessary without observing the injunctions imposed by the laws of peace and war. Such is the horrendous monster engendered unwittingly by the inept Kellogg Peace Pact. (3) (4)

Another indication of this increasing lawlessness is the lowering of respect for ordinary international obligations. To all intents and purposes England and France have repudiated their financial engagements with the

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United States and thus struck a serious blow at the sanctity of agreements among nations. Germany might well feel less compunction in freeing herself from the obligations imposed by the Treaty of Versailles. Italy and Japan likewise have taken bold, independent action in cynical defiance of the League of Nations. Mexico unblushingly announces a policy of expropriation of the property and the livelihood of foreigners amounting to confiscation and robbery. And other nations are intimating that they too will resort to similar methods of international brigandage.

It is not entirely exact to attribute this trend towards lawlessness simply to the amazing rise of dictatorships throughout the world, though this may make it easier to flout the usages of nations. What is most disquieting is the fact that the masses of people living under dictatorships are indifferent to this trend. In some instances they openly and enthusiastically favor the repudiation of any obligations, moral or legal, which stand in the way of arbitrary national action. The attitude of the Russian people is differentiated and accentuated only by the amazing claim that there can be no binding international law apart from the class interests of the proletariat. They are not interested in preserving a law which they insist has been created and fostered by a capitalistic civilization.

That international law is seriously discredited and on the defensive is all too evident. That is rapidly being jettisoned without any indication of a desire to create a substitute system of law between nations is increasingly apparent.

.....

We must first be prepared to recognize that the spread of international lawlessness is due not solely

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to lower ethical standards but mainly to the irresistible pressure of the Social Revolution which is sweeping the entire world and undermining many established institutions and principles of our western civilization. The est workers of the world have become articulate and are now veiding ancient grievances against a civilization which too long has been indifferent to the legitimate claims of mankind. They have little interest in legalistic forms and systems. They are seeking a new freedom that looks to the creation of a new social order which transcends the arregant claims of national sovereignty.

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x) The American Journal of International Law; vol. 32 1938, p. 775 aqq.

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Exhibit No. 53
(cont')

XI.

Borchard, Edwin:

Neutrality and Unneutrality. *)

Before 1914, it was hard to find much difference of opinion among American citizens about the proper policy of the United States in relation to foreign wars or even foreign affairs. .... Detachment from Europe's political entanglements, non-intervention in its internal affairs, and neutrality in its wars were the keynotes.

.....

After 1941 a marked change occurred, especially in relation to Europe. For a variety of causes set out in numerous books, the most recent of which is Tansill's AMERICA GOES TO WAR, America lost its bearings. The magnitude of the European contest, the association of cultural and economic interests with one side, and extraordinary ineptness in dealing with the legal problems involved, ultimately induced a state of Hysteria which plunged the nation into war. The European feud, more senseless than its predecessors of earlier centuries, was pictured as a struggle between morality and immorality, and in the search for an explanation to the American public for the country's departure from its fundamental traditions, there was invented at the last minute that curious battle-cry of making the world "safe for democracy." (1) This must have surprised some of the Allied Governments. It was in that/ora that there was born the ideal of allied force in the service of righteousness, later called "collective security", which has done so much to prolong the world's misery by viewing the world through the doctrinaire spectacles of political theology instead of the open-minded detachment of a physician seeking a correct diagnosis of a social disease. The war (2) (3)

H1264-0153

produced a psychosis, continued in the Treaty of Versailles and its aftermath, of which Articles 10 and 16 of the Covenant were an exemplification rather than an antidote. Historians and psychologists will in due course explain why some of the principal governments of the western world so long divorced themselves from reason and experience, and immersed in illusions, permitted the corrosion of the political and economic structure. (4) (5)

For it is an unfortunate fact that the attempt to maintain the adventitious status quo f 1919 through devices of the Covenant and by more formal military alliance resulted in an intensification of nationalism almost unprecedented. At the same time the less informed were led to believe that phrases such as "collective security," interpreted by the League of Nations, manifested a growing internationalism and disposition to adopt peaceful processes in the adjustment of international differences. The disintegration, however, was a fact, the pacification but a fiction. When we consider the progress that had been made in the 19th and early 20th centuries in the development of arbitration and conciliation, it seems deplorable that since 1917 the world's moving forces should have come under the domination of a psychology which encouraged treaties and pacts signally devoid of conditions essential to international appeasenent, while cherishing the delusion that peace was being promoted by arrangements for the use of combined force against any revolter against the status quo, vilified in advance by the opprobrious name of "aggressor." Of this process perhaps the most unfortunate phase was the phase was the popular illusion that peace might be assured by bestowing seductive names such as "collective security," "preventing war", "international cooperation", on contrivances, like sanctions, which were hostile and warlike in character. In defense of this form of deception, it can only be said that it was not new. Article 47 of (6) (7) (8) (9)

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the Treaty of Westphalia, 1648, embodied a similar device. As Judge John Bassett Moore has said, all human history is characterized by the tendency to seek salvation in phrases rather than in acts.

We ware told during the World War that the balance of power and military alliances were the source of the world's ills and that these ills could be cured by replacing alliances with a League of Nations - once inadvertently called a "disentangling alliance". But just as an alliance is a combination of two or more nations seeking certain common ends, so the "collective security" of the League was marked by an identical characteristic - that it sought the attainment of common ends by the use of coercion and military force. But it is to be feared that the education of men's minds to the compulsive features of "collective security" has had disastrous effects. It has diminished appreciation and respect for the less dramatic peaceful processes of effecting change and settling disputes. It has led to a disparagement of the century-old peace-preserving instituion of neutrality, with which the theory of united coercion is incompatible. It has induced a revival of ancient and unworkable theoretical distinctions between a just and an unjust war. It has caused a denunciation of tried experience and detachment in seeking sensibly to understand and hence intelligently to conciliate conflicting claims. It has brought about a practice of passing moral judgments upon national ambitions and mass movements, in the name of a supposedly ideal scheme the real character and practical effect of which its votaries failed adequately to analyze. One of the sad concomitants of this tragedy of errors is the neglect of those elementary considerations of human experience which distinguish friendship from hostility, peace from war, conciliation from intransigeance, negotiation

(10) (11) (12)

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from dictation. Indeed, it was not uncommon to hear the developments of the 19th century decried and depreciated as international anarchy, because forsooth the European War broke in 1914, whereas the"new" system of "enforcing peace" was extolled as the embodiment of wisdom, justice and righteousness. This "new" system was pictured as the "new" international law; hence all the old law that conflicted with the ideal had to be attacked as obsolete if not in deed obstructive. Neutrality, a hard-won institution which since the 16th century had served to keep a large part of the world at peace under the regulation of law, an institution which peacemakers had cherished as one of the most constructive achievements of a slowly developing civilization, fell under the ban of the "new" school of peace through combined force. And so effectively did this false theory help to prevent the rebirth of the process of appeasement that the world now stands aghast before the new disasters which threaten. (13) (14)

In a less hysterical age, the "new" theory could not have gained so many adherents. (15)

.....

Such a system postulates a mature society with an authorized lawgiver, obligatory adjudication, willingness to accept adverse judgments or societal coercion. It assumes that the judges are unbiased, actuated only by objective considerations. Among sovereign nations such a system is a wishful dream. So long as it seemed to serve the interests of certain states, nothing was done to puncture the illusion; but the moment that the system came up against the ambitions of strong Powers, in or outside the League, the sorry truth was revealed. And now, even its original sponsors and supposed beneficiaries have turned their backs upon the illusion, hoping (16)

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against hope to recover the lost ground of negotiation, conciliation and appeasement as the only practical methods of preventing war.

But for the fact that the unfortunate ideology of Articles 10 and 16 preached oblivion for neutrality, and especially American neutrality, it would not be necessary to spend so much time and space in exposing the dangers of the "new" system. But its devotees were fond of drawing the analogy to a private legal system or to personal relations, and asked, "If a bully assaults Mr. Milquez toast, you wouldn't stand by in safe neutrality and watch the unfair assault, would you?" This seemed to the propounders unanswerable. But only slight examination will disclose the impropriety of the analogy. Nations, like all living organisms, are subject to the laws of evolution and life. (17)

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State ethics and personal ethics are not identical.

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*) A. J., vol. 32, 1938, p. 778 sqq.

XII

C O H N Georg

Neo-Neutrality (1939), p. 93:

. . . .

"This "epoch-making" document (the Kellogg-Briand pact) thus could not really be of any legal significance for the future validity of the law of neutrality; there were not even technical difficulties arising from it in this connection. The law of war, and consequently the law of neutrality, were completely unaffected by the Kellogg Pact, as to their legal validity, and remained in force as before."

. . . . . .

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XIII

C.G. Fenwick:

International Law And Lawless Nations.*)

"For many months the specter of war, like the sword of Damocles, has hung over the heads of the European nations. Now the thread has broken and war is in our midst. Force has usurped the seat of law, and the fate of nations depends not upon reason or justice, but upon the power of superior armaments to impose their will upon defeated peoples. International law, long under an eclipse, has now become almost a byword of reproach. It has failed in its primary task; and while many of its minor rules may continue to be observed when operating outside the area of hostilities, its major rules arising out of treaties for the pacific settlement of disputes are temporarily in abeyance. Even the paradoxical "laws of war" will, if observed in part, by observed not because of the authority of "law" behind them, but because of the fear of reprisals from an enemy capable of inflicting equal death and destruction in return for what it may suffer. (1)

It was not difficult to foresee the coming of the catastrophe that is now upon us. For some twenty years scholars in many lands have sought to build up the authority of international law and have warned again and again that unless certain conctructive steps were taken the nations would be faced with a general breakdown of law and order. The breakdown has now come, and not even the most "neutral" or "isolationist" nation can escape its fateful consequences. While the populations of the belligerent countries undergo the sufferings of a conflict carried on with every know instrument of destruction, the populations of other countries (2)

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look on in dumb horror at the tragedy that has come upon their fellow human beings, and witness with helpless hands the devastation of the most precious records of our common civilization.

Once more, we ask ourselves, what was the fatal weakness in the structure of international law during the past twenty years? Why is it that the principles that have been proclaimed by scholars and statesmen as the basis of a new and stable peace have failed us? Is it that the principles themselves were inherently unsuited to become the foundations of an enduring structure, or is it that the leaders of the great nations were too short-sighted to see the necessity of adhering to them when the conditions arose calling for their application? The issues upon which the answers to these questions depend have been exhaustively discussed; but we are still far from an agreement upon the causes of the present war in relation to the principles which were relied upon to prevent it,.....

.....It was the Covenant of the League of Nations which first presented the question whether national security might be brought within the realm of law, whether states might be denied the old right of self-help in return for a collective responsibility of the whole community of nations to protect them. That the fundamental principle of "collective security" was a sound one was almost unanimously accepted by scholars outside the United States and by the great majority of American scholars. Such differences of opinion as arose were concerned with the choice of methods for enforcing the principle rather than with the principle itself. A decade passed before the principle was put to a serious test; then, beginning with the invasion of China by Japan in 1931, the stronger Powers whose support was essential to the authority of

The League began to think once more in terms of immediate national interests and entered upon the series of compromises which led in the end, by one fatal step after another, to the complete abandonment of the conception of community responsibility for acts of aggression. Why risk a general war to suppress a local one? The argument seemed convincing to the public at large. For it was not easy for the average citizen to see that the rescue of China and Abyssinia and Czechoslovakia involved primarily not the protection of those particular states but the larger principle whether the old right of self-help was to be allowed to reassert itself and states might once more take the law into their own hands. Those who should have seen the connection failed to do so, or, seeing, refused to risk their political fortunes in an unpopular cause.

Equally disastrous was the inability of statesmen and of the public at large to comprehend that the conception of a world of law and order could not be limited to the maintenance of the status quo. Again and again it was pointed out by those who were concerned with the constructive development of international law, that unless some machinery were established for the revision of the treaties of 1920 and unless steps were taken to remedy certain social and economic conditions existing independently of treaty obligations, it would be impossible to prevent the recourse to violence that always follows a belief that no remedy is available But while abstract discussions of remedy by "peaceful change" were going on, nations which felt aggrieved proceeded to arm with deliberate intent of using force and threats of force to accelerate the response to their demands. These threats of force in turn halted the slow-moving procedures of peaceful change, until the vicious

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circle was created which made it impossible to make concessions to threats of force and made threats of force seem the only alternative to the refusal to make concessions. Thus the rule of law, in accordance with which the judgment of the international community takes precedence over the claims of the individual, gave way to the old right of self-help and to the anarchy that inevitably attends it....."

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*) (The American Journal of International Law, vol. 33, 1939, p. 743-745.)

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Exhibit No. 56

XIV.

Lauterpacht

(Oppenheim, International Law, 6th ed.,
by Lauterpacht, 1940, II, p.512-514)

states that the Pact of Paris
"has not directly affected the law of neutrality. It has not imposed upon the signatories the obligation to abandon all or some duties of neutrality to the disadvantage of the State breaking the Treaty. (1) Neither has it conferred upon them the right to modify the laws of neutrality in that direction. For war waged in violation of the Treaty is nevertheless war conferring upon the guilty and innocent belligerents alike all the rights flowing from the accepted law of war and neutrality. Accordingly, the guilty belligerent is entitled to expect that the other signatories of the Treaty will, if they elect to remain neutral, treat him in accordance with the cannons of impartiality. There is no doubt that by destroying the basis of the traditional doctrine of neutrality as an attitude of absolute impartiality, namely, the unrestricted right of sovereign States to go to war, the Treaty has provided the starting-point for important changes in the law of neutrality. (2) These changes, however, must be effected by common action of States themselves, and not by jurists engaged in drawing logical consequences from the Treaty."

..... While no right to discriminate against the guilty belligerent in disregard of the accepted rules of neutrality can be deduced from the terms of the Treaty, it is arguable that such discrimination may be resorted to in pursuance of a measure of reprisals. Under the legal regime established by the Treaty, the outbreak of war is no longer an event concerning the belligerents only; its bearing upon third States is not limited to pro

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ducing automatically a relation of neutrality pure and simple. For, as a rule, the outbreak of war will be due to a violation of the Treaty on the part of at least one belligerent. The guilty belligerent, by breaking the Treaty, violates the rights of all other signatories, who, by way of reprisals, may choose to subject him to measures of discrimination, for instance, either by actively prohibiting some or all exports into his territory or merely by submitting passively to otherwise unlawful measures on the part of the innocent belligernt."

XV

Kelsen, Hans :**)

Collective and Individual Responsibility in International Law with Particular Regard to the Punishment of War Criminals. *)

Among all postwar problems none is more constantly discussed and no demand more rightly made than that the persons who, as members of the gov rnments or of the armed forces, or as subjects of the Axis Powers, have committed certain offenses against international law should be brought to justice. 1) What are the offenses for which

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*) California Law Review, vol. 31, 1942-1943.

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1) The punishment of war criminals plays an important role in the Declaration signed on November 1, 1943, at the historic Three Power Conference in Moscow. Since the United States, Great Britain, and Soviet Russia made the punishment of the war criminals one of their war aims, it is fruitless to raise the question whether it is advisable, from the point of view of the future peace, to institute, after or during the war, legal procedures for the punishment of war crimes. In a discussion on the establishment of an international criminal court which took place at the Thirty-third Conference of the International Law Association held at Stockholm in 1924, Sir Graham Bower said: "There is no nation in the world which has not violated the laws of war, and there is no army or navy in the world which has not committed war crimes." And further: "What will be the consequences (of a punishment of war criminals)? When the soldiers and sailors have finished fighting, when they are ready to shake hands over a treaty of peace, then the lawyers are to begin a war of accusation and counter-accusation and recrimination, which will be worse than war. General Sherman said, "War is Hell", and he spoke the truth; but, with all due respect, I submit that if this proposal were adopted, it would make peace a hell." Sir Graham Bower terminated his speech by saying: "A bas la guerre des proces, vive la paix de l'esperance."
(1925) THE INTERNATIONAL LAW ASSOCIATION REPORT OF THE THIRTY-THIRD CONFERENCE 93, 95. (1)

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retribution may be claimed, and what are the principles of justice applicable to these offenses?

I.

The offenses for which retribution may be claimed are, in the first place, violations of international law committed by having resorted to war in disregard of general or particular international law, or by having provoked war, that is to say, by having committed S.531
the international delict against which the war has been a just reaction. It is a fundamental principle of general international law that war is permitted only as reaction against a wrong suffered, that is to say, as a sanction, and that any war which has not this character is a violation of international law. This is the principle (2)
of bellum justum (just war.) 2) There can be no doubt that Germany, by resorting to war against Poland and Soviet Russia; Italy, by resorting to war against France; and Japan, resorting to war against China and the United States, having violated this principle. By resorting to war, the Axis Powers have in addition violated the Kellogg-Briand Pact by which war is outlawed as a means of national (3)
policy; moreover, Germany, by resorting to war against Poland and Soviet Russia has violated the non-aggression pacts concluded with the attacked States. The demand to punish the war criminals is, or should be, above all, the demand to punish the authors of the second World War, the persons morally responsible for one of the greatest (4)
crimes in the history of mankind.

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2) Most of the writers on international law do not recognize the principle of just war as a rule of positive law. In KELSEN, LAW AND PEACE IN INTERNATIONAL RELATIONS (1942) pp. 34 et seq., I presented the main arguments pro and contra this view.

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In the second place, the crimes for which retribution may be claimed are breaches of the rules of international law regulating the conduct of war, such as the Hague Convention of 1907 respecting the laws and customs of war on land, the Geneva Convention of 1929 concerning the treatment of sick and wounded and of prisoners of war, and many other rules of customary and conventional international law regarding warfare. These are "war crimes" in the narrower sense of the term. Some writers consider as war crimes also all hostilities in arms committed by individuals who are not members of the enemy armed forces, espionage and war treason, and finally, all marauding acts.[3)]

War crimes in the wider sense of the term, including offenses of international law committed by resorting to or provoking war, are delicts in a strictly legal sense. They are violations of international law committed by States or by individuals; the latter may or may not be members of the armed forces. War crimes in the narrower sense of the term are at the same time violations of national (municipal) law in so far as they constitute crimes according to the general criminal law of a State or according to particular norms of its criminal law providing sanctions against the (s.5 violations of the rules of international law concerned. War crimes (in the broader sense of the term) may be committed on the territory of the State which, or whose subject, is the delinquent, or on enemy territory occupied by the armed forces of the State which, or whose subject, is the delinquent.

The demand for retribution is sometimes extended to violations of the principles of humanity, that is to say, to acts which, though not illegal from the point of view

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3) Cf. 2 OPPENHEIM, INTERNATIONAL LAW (6th ed. 1940) 450 et seq. (s.531)

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of international or national law, are breaches of the norms of morality against which neither international nor national law provides any sanction, and for which no legal responsibility is established. The problem of punishing these offenses is not within the scope of the present essay.

"Principles of justic" to be applied in the trials of the war criminals is understood to be the law which can and should be applied to punish the criminals - international or national (municipal) law. If international law, existing general or particular international law, or international law to be created in the future by international treaty; if national law, the law of the State which has, or whose subjects have, been injured by the crime, or the law of the State which has, or whose subjects have committed the crime. These questions are closely connected with the question as to whether an international court or national courts shall have jurisdiction over the crimes concerned; and if national courts, whether civil or military courts of the injured States or of the State whose subjects are to be punished.

II.

To answer these questions we must first of all note that the demand for punishment of war criminals means making the individuals responsible by punishing them for acts committed by themselves or for acts committed at their command or with their authorization. It does not mean to punish a State as such, that is, a State as a body corporate. It is generally assumed that the sanctions which international law provides against States as such, namely reprisals and war, are not punishments in the sense of criminal law.

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.....The statement that according to international law (S.534)
the State is responsible for its acts means that the subjects of the State are collectively responsible for the acts of the organs of the State; and the statement that international law imposes duties on States and not on individuals means, in the first place, that the specific sanctions of international law - reprisals and war - constitute collective, not individual, responsibility.

Since the demand to punish the war criminals aims at individual responsibility of the persons who by their own conduct have performed the crimes, it seems impossible to satisfy this demand on the basis of general international law. (6)

The establishment of collective responsibility by international law, however, only establishes a rule with important exceptions. There are norms of general international law by which the person against whom a sanction is to be directed is individually determined as the person who, by his own conduct, has violated international law. These norms establish individual responsibility. Such a norm of general international law is the rule forbidding piracy. (7)

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Other norms of general international law by which (P.53
individuals are directly obligated and individual responsibility is established are the rules concerning breach of blockade and carriage of contraband.

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Another example of direct obligation of individuals and individual responsibility established by general international law is the rule concerning a specific act of illegitimate warfare, sometimes characterized as "war (P.536)

crime".

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If the individuals who are morally responsible for (P.538)
this war, the persons who have, as organs of their States, disregarded
general or particular international law, and have resorted to or
provoked this war, if these individuals as the authors of the war
shall be made legally responsible by the injured States, it is
necessary to take into consideration that general international
law does not establish individual, but collective responsibility (8)
for the acts concerned, and that the acts for which the guilty
persons shall be punished are acts of State - that is, according (P.539)
to general international law, acts of the government are performed
at the government's command or with its authorization. 8)

The legal meaning of the statement that an act is an
act of State is that this act is to be imputed to the State, not (9)
to the individual who has performed the act. If an act performed by an
individual - and all acts of State are performed by individuals
- must be imputed to the State, the latter is responsible for this
act; and that means so far as general international law is concerned,
that collective responsibility takes place, constituted by reprisals
or war, the specific sanctions of international law. If an act is
to be imputed to the State and is not to be imputed to the individual
who has performed it, the individual, according to general international
law, is not to be made responsible for this act by another State without
the consent of the State whose act is concerned. As far as the
relationship of the State to its

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8) OPPENHEIM, op. cit. supra note 4, at 274, defines a State's "own actions" as "its government's actions, and such actions of the lower agents or private individuals as are performed at the Government' command or with its authorization."

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own agents or subjects is concerned, national law comes into consideration. And in national law the same principle prevails: an individual is not responsible for his act if it is an act of State, i.e., if the act is not imputable to the individual but only to the State.[9] The other State, injured by such an act, can, without violating international law, make only the State whose act constitutes the violation of international law responsible

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9) This rule, it seems, is not without exceptions. An individual who in his capacity as organ of the State has performed an illegal act may be made responsible for it. Thus, according to the law of some States, a Cabinet minister, and even the Head of State, may be accused and punished for having violated the constitution by one of his acts. But when the act is declared by the competent authority to be illegal with regard to the State's own law, it ceases to be an act of State - that is to say, the act can no longer be imputed to the State, whether it be annulable or not. To impute to the State an act that by the competent authority is declared to be illegal with regard to the State's own law is incompatible with the fact that the State, conceived of as an acting person, is but the personification of this law - i.e., the national legal order (or, what amounts to the same, the personification of the community constituted by this legal order). Within national law an act performed by an individual can be imputed to the State only on the basis of a legal rule; imputation of an act to the State is subsumption of the act under a specific rule of law; and an individual can be considered as organ of the State only insofar as he performs acts imputable to the State. If an act is considered to be illegal with regard to the law of the State, it is hardly possible to interpret this act as act of State; and within national law the predicate "act of State" is a specific interpretation of an act performed by an individual. The State can do no wrong with regard to its own law, although the State can well do wrong with regard to international law. According to international law, "act of State" is any act performed by the Government, at its command or with its authorization, regardless of the question of whether the act is legal or illegal according to national law and consequently imputable or not imputable to the State according to this law. "Act of State" in the sense of international law means the specific collective responsibility of the State established by general international law.

for the act and the injured State may resort to reprisals or war against the responsible State. But prosecution of an individual by courts of the injured State for an act which, according to international law, is the act of another State, amounts to exercising jurisdiction over another State; and this is a violation of the rule of general international law that no State is subject to the jurisdiction of another State. Since the legal existence of a State manifests itself only in acts of individuals which, according to international law, are acts of State, the generally accepted rule that no State can claim jurisdiction over another State can claim civil or criminal jurisdiction over the act of another State. The immunity from the jurisdiction of another State is not, as this principle is usually formulated, attached to the very "person" of the State - the "person" of the State is a juristic construction - but to the acts of the State as the acts performed by the government, at its command or with its authorization. The generally recognized principle that the courts of a State are not competent with regard to another State means that the courts of a State are not competent with regard to the acts of another State. Consequently, this principle applies not only where the defendant is expressly designated as the "State X" or the "person" of State X, but also where the defendant is an individual sued personally for an act performed by him as an act of State X.[10] The collective responsibility of a State for its (12) (13)

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10) In the Report adopted by the Committee of Experts for the Progressive Codification of International Law at its third session, March-April, 1927, Rapporteur Matsuda, (PUBLICATION OF THE LEAGUE OF NATIONS, LEGAL, 1927, V, 9) 22 Supp. AM.J.INT.LAW 119, it is said: "The inability of courts to exercise jurisdiction in regard to a sovereign act of a foreign government .....should apply where the defendant is sued personally for acts done by him in his capacity as a public official - though he no longer retains that capacity at the time of the proceedings - or under powers conferred upon him by a foreign State."

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own acts excludes, according to general international law, the individual responsibility of the person who, as a member of the government, at the command or with the authorization of the government, has performed the act.[11] This is a consequence of the immunity of the State from the jurisdiction of another State. This rule is not without exceptions but any exception must be based on a special rule of customary or conventional international law restricting the former.[12] (S.541)

In this respect there exists no difference between the Head of State and other State officials.[13] That a (14)

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11) In the famous case of McLeod (member of a British force sent in 1837 into the territory of the United States for the purpose of capturing the Caroline, arrested in 1840 in the State of New York, and indicted for the killing of an American citizen on the occasion of the capture of the Caroline), Mr. Webster, Secretary of State, to Mr. Crittenden, Attorney General, March 15, 1841: "All that is intended to be said at present is, that, since the attack on the Caroline is avowed as a national act, which may justify reprisals, or even general war, if the Government of the United States, in the judgment which it shall form of the transaction and of its own duty, should see fit so to decide, yet that it raises a question entirely public and political, a question between independent nations; and that individuals connected in it cannot be arrested and tried before the ordinary tribunals, as for the violation of municipal law. If the attack on the Caroline was unjustifiable, as this Government has asserted, the law which has been violated is the law of nations; and the redress which is to be sought is the redress authorized, in such cases, by the provisions of that code." Cf. 2 MOORE, A DIGEST OF INTERNATIONAL LAW (1906) paragr. 179.

12) See infra p. 553.

13) In the memorandum of the American members of the Commission on Responsibilities established at the close of the first World War by the Preliminary Peace Conference (1920) 14 AM.J.INT.LAW 136, it is said that "Proceedings... against an individual in office" are in " effect" proceedings "against the State." The American members of the Commission on Responsibilities advanced this argument to justify their opposition against the intention to bring Wilhelm II to justice before an international Tribunal. They refused to subject a Chief of State "to a degree of responsibility hitherto unknown to municipal or international law." (p.135) In their memorandum they declared: "His (theChief's of State) act may and does bind his country and render it responsible for the acts which he has committed in its name and its behalf, or under cover of its authority; but he is, and it is submitted that he should be, only responsible to his country.... The law to which the Head of the State is (15)

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Head of State is not individually responsible to another State for acts performed by him in his capacity as organ of his State is not due to the personal privilege of exemption from criminal and civil jurisdiction of another State granted to Heads of State by general international law. Nonresponsibility of the Head of State for his acts of State is the consequence of the rule of international law that no State can claim juristdiction, exercised by its courts, over acts of another State. The personal privilege of exemption from criminal and civil jurisdiction of another State granted by international law to Heads of State refers, in the first place, not to acts of State performed by a Head of State, but rather to acts committed abroad by a Head of State in his capacity as a private person. Consequently, the same privilege can be and is granted by international law to the wife of the Head of State who may never perform and act of State. The personal privilege of exterritoriality (S.542) (16)

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responsible is the law of his country, not the law of a foreign country or group of foreign countries....." In another passage of the memorandum it is said (p.148) "that Heads of States are, as agents of the people in whom the sovereignty of any State resides, responsible to the people for the illegal acts which they may have committed, and that they are not and should not be made responsible to any other sovereignty...; that the essence of sovereignty consists in the fact that it is not responsible to any foreign sovereignty; that in the exercise of sovereign powers which have been conferred upon him by the people, a monarch or Head of State acts as their agent; that he is responsible only to them, and that he is responsible to no other people or group of people in the world." Apart from the confusion of the doctrine of popular sovereignty (not applicable to some monarchical States) with the legal principle of State sovereignty, and apart from the questionable statement that Heads of State are always responsible to their people, the thesis advocated by the American members of the Commission on Responsibilities: that a Head of State, acting as agent of his State, is not individually responsible to another State, is undoubtedly correct. This principle applies not only to Heads of States, but also to all individuals acting as agents of a State. If the State is sovereign, any agent of the State exercises the sovereignty of the State; and the principle that no sovereignty is responsible to another sovereignty is but a more general formulation of the rule that no State is subject to the jurisdiction of another State. (17)

must be granted to a Head of State only as long as he is actually in office, not after he has been deposed or has abdicated, or his office has expired. For his act of State, however, he is individually not responsible to another State, even after his deposition, abdication, or expiration of office, since the act was performed when he was still in office; otherwise the act could not have been an act of State. Non-responsibility of the Head of State for his acts of State, based on the rule that no State can claim jurisdiction over the acts of another State, works also in the case where the Head of State has fallen into his enemies' hands as prisoner of war, even if his personal privilege of exterritoriality does not work because it is limited to the time of peace and does not apply in time of war. There is no sufficient reason to assume that the rule of general customary law under which no State can claim jurisdiction over the acts of another State is suspended by the outbreak of war, and consequently that it is not applicable to the relationship between belligerents. (78) (79)

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If individuals shall be punished for acts which they have performed as acts of State, by a court of another State, or by an international court, the legal basis of the trial , as a rule, must be an international treaty concluded with the State whose acts shall be punished, by which treaty jurisdiction over these individuals is conferred upon the national or international court. S.F

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The law of a State contains no norms that attach sanctions to acts of other States which violate international law. Resorting to war in disregard of a rule of general or particular international law is a violation of international law, which is not, at the same time, a violation (120)

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of national criminal law, as are violations of the rules of international law which regulate the conduct of war.

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An international treaty authorizing a court to punish individuals for acts they have performed as acts of State constitutes a norm of international criminal law with retroactive force; for the acts were at the moment when they were committed not crimes for which the individual perpetrators were responsible. There is no rule of general customary international law forbidding the enactment of norms with retroactive force, so-called ex post facto laws. But some State constitutions forbid it expressly and it is a principle of criminal law recognized by most of the civilized nations that no punishment must be attached to an act which was not legally punishable at the moment of its performance. Some writers, S.5[illegible] abandoning the positivist view, maintain that not only custom and treaties but also the general principles of law are to be considered as sources of international law. 14a) This doctrine is very questionable and, even if accepted, does not exclude an international treaty authorizing a court to punish the persons morally responsible for the second World War. (21) (22) The principle forbidding the enactment of norms with retroactive force as a rule of positive national law is not without many exceptions. Its basis is the moral idea that it is not just to make an individual responsible for an act if he, when performing the act, did not and could not know his act

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14a) In the Report of the Subcommittee on the Trial and Punishment of War Criminals appointed by the House of Delegates of the American Bar Association July 20, 1943, published in (1943) 37 AM.J.INT.LAW 663, it is said: "The principles of criminal law generally accepted among civilized nations are also a proper source of international law. If doubts arise, there should be prom agreement upon a restatement of what the pertinent law has been and the proceedings and penalties which it admits. Caution should be exercised to exclude anything which may fairly be denounced a legislation after the event."

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constituted a wrong. If, however, the act was at the moment of its performance morally, although not legally wrong a law attaching ex post facto a sanction to the act is retroactive only from a legal, not from a moral point of view. Such a law is not contrary to the moral idea which is at the basis of the principle in question. This is in particular true of an international treaty by which individuals are made responsible for having violated, in their capacity as organs of a State, international law. Morally they were responsible for the violation of international law at the moment when they performed the acts constituting a wrong not only from a moral but also from a legal point of view. The treaty only transforms their moral into a legal responsibility. The principle forbidding ex post facto laws is- in all reason - not applicable to such a treaty.

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When the second World War broke out, the legal situation was S.546 different from that at the outbreak of the first World War. The Axis Powers were contracting parties to the Kellogg-Briand Pact by which resorting to a war of aggression is made a delict; and Germany has, by attacking Poland and Russia, violated, in addition to the Kellogg-Briand Pact, non-aggression pacts with the attacked States. Any inquiry into the authorship of the second World War does not raise problems of extraordinary complexity. Neither the questio juris nor the questio facti offers any serious difficulty to a tribunal. Hence, there is no reason to renounce a criminal charge made against the persons morally responsible for the outbreak of World War II. In so far as this is also a question of the constitutional law of the Axis Powers, the answer is simplified by the fact that those States were und r more or less dictatorial regimes, so that the number of persons who had the legal power of

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leading their country into war is in each of the Axis States very small. In Germany it is probably the Fuehrer alone; in Italy, the Duce and the King; and in Japan, the Prime Minister and the Emperor. (025)

If the assertion attributed to Louis XIV "l'Etat C'est moi" is applicable to any dictatorship, the punishment of the dictator amounts almost to a punishment of the State. Another question is whether it will be actually possible to lay hold on these persons in order to bring them to justice. S.547

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APPENDIX III.

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